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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 85

GUY PORTER GILLETTE,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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Opinions Below

The decision of the court of appeals (A. 19-22) is reported at 420 F.2d 298 (2d Cir. 1970). The judgment of the district court is unreported (A. 18).

Jurisdiction

The judgment of the Court of Appeals was entered on January 9, 1970. The petition for certiorari was filed on February 11, 1970 and certiorari granted on June 29, 1970. This court has jurisdiction under 28 U.S.C. sect. 1254 (1).

Statutes and Regulations Involved

Military Selective Service Act of 1967, Sect. 6 (j), 50 U.S.C. App., Sect. 456 (j):

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code."

Questions Presented

1. Can a non-religious objector claim a 1-O classification?
2. Can an objector who frames his opposition to war in terms of the Vietnam war, the war he is then faced with, qualify as a conscientious objector?

Statement of the Case

Petitioner was convicted of refusal to report for induction into the Armed Forces in violation of the Military Selective Service Act of 1967 and sentenced to a term of two years imprisonment. He had originally registered with Local Board No. 8 of Yonkers, New York on March 4, 1964. He worked as a photographer's assistant for one year and then became a full time student at the Neighborhood Playhouse School of the Theater (located in New York City) in September, 1965, studying to be an actor. He continued at the school for its full two year program.

In April, 1967, Petitioner requested a SSS Form 150 to apply for conscientious objector status. He said in his covering letter:

> "I am requesting the classification of conscientious objector on the basis of the following reasons:
>
> 1) I believe that the United States government is using all the brutal instruments of modern war against a poor peasant population which simply claims the right to have a government of its own free choice. . . .
>
> 2) I object to any assignment in the United States Armed Forces while this unnecessary and unjust war is being waged, on the grounds of religious belief specifically "Humanism". This essentially means respect and love for man, faith in his inherent goodness and perfectability, and confidence in his capability to improve some of the pains of the human condition.
>
> Religion of Humanity: 'holding that mans duty is chiefly or wholly comprised in the advancement of the human race.'—The Oxford Universal Dictionary.
>
> I would like to request that you send me a Form 150" (A. 23-24).

In his SSS Form 150 Petitioner claimed he could neither affirm nor deny a belief in a Supreme Being. When asked to describe the nature of his belief, on which he based his C.O. claim, he stated:

> "Religion, to me, means the devotion of man to the highest ideal that he can conceive. A respect for the dignity and worth of every human being and a capacity to enter into decent and just and loving relations with other human beings, is not dependant upon being a member of a specific Religious Sect or organization.
>
> "The following quote from John Haynes Holmes expresses my feelings very well:

> 'Religion is the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands . . . it is the supreme expression of human nature; it is man thinking his highest, feeling his deepest, and living his best' " (A. 27, 29).

In response to question 5 of the form ("Under what circumstances, if any, do you believe in the use of force?") he answered:

> "For the personal protection of self and other individual persons.
>
> To enforce a decision, by a majority of the United Nations, against a country accused of breaking the peace, or the direct defense of my country. See statement originally sent Local Board 8" (A. 26).

Petitioner submitted six letters with his application (See A. 33-42): One, from the Episcopal priest who has baptized him, stated:

> "I am amazed at young Guy's thought on the subject of Pacificism as expressed in his answers to salient questions. It shows real concern for Christian neighbors, a great deal of hard study and soul-searching. It is true it might be based on a deeper and more historical religious conviction; but the Humanist position is succinctly put" (A. 40).

Another letter was sent by a Congregational minister who had known Petitioner from earliest childhood:

> "I have known Guy Gillette from his earliest childhood. In all my contacts and conversations with him, I have always found him to be serious-minded and utterly honest. More than what is usual in youth, he has been

inclined to be very sensitive to the deeper meanings of life and in his regard for them. Often, even as a child, I found him asking the profounder question which more adult minds missed or lightly dismissed.

As to his present claim to being a conscientious objector, I believe it to be primarily related to the war efforts in which our country is now engaged. I have spoken with him frequently over the past few years concerning them and I cannot agree with his evaluation of our commitment and obligation as a nation. I do not, however, question the sincerity with which he holds his position, nor with his conviction that to support them by bearing arms would both be a basic personal betrayal of what he believes and detrimental to the nation's welfare. This has been a burdensome and agonizing matter with him which he has sought to resolve objectively and, at whatever cost to himself, he feels he must maintain responsibly and with a sense of duty. I only regret that his orientation has been such that he cannot see it differently.

His objection on the basis of religious conviction, I believe to be secondary but of longer standing and of more significance" (A. 33-34).

Petitioner's Godfather, Archie Smith, wrote to the draft board:

"As a child he was always serious, honest and straightforward. In his formative years he has proved himself to be a young man of strong principles and integrity and of a moral character beyond reproach. His present stand is not that of the coward or the draft dodger. On the contrary it is an act of extreme courage. It is not easy to take a stand that exposes him to the easy accusation of being unpatriotic, even when his stand is born of a deep love for America and a desire for a higher morality in her relations with other nations" (A. 35).

On June 21, 1967 the Local Board denied Petitioner's 1-O application and classified him 1-A. He filed a notice of appeal with the State Director who requested that the local board arrange for a personal appearance in accordance with 32 C.F.R. 1624.1. Petitioner appeared on August 8, 1967 to explain his position to the board. He later testified concerning his appearance:

> "Well, approximately they asked me if I was opposed to all war and I said yes, that I was. Then they said, but are you specifically opposed to the war in Vietnam. I said I am, yes, because that's the war I am faced with. That's the only war that I have to contend with at the time. I don't have to worry about any other war so I said yes, I am opposed to the war in Vietnam. And then I believe they asked me 'Would you serve as a non-combatant in the United States Army?' And I told them that I wouldn't because I felt that was aiding the war effort, which I was opposed to.
>
> Then they asked me 'Would you accept civilian duty in a hospital, or that type of civilian duty,' and I said yes, that I would.
>
> Then they were talking about my religious beliefs. They said, 'You know, is your religion, are you basing this on your religion,' and I explained that my religion was a humanist—it was based on a humanist approach to religion, that it wasn't a more or less recognized religion, and I said that I believed that man is totally responsible to himself for what he does, and that the responsibility is up to me to make a decision as to whether I will kill another man."
>
> • • • • •
>
> "I told them what I just said about the Nuremberg charter, and as I recall, there was no statement at all either way to any of these things except, you know, yes

and no, and they were just agreeing. And I believe that that was about all that transpired between us and they said okay."

• • • • •

"Q. Now, Mr. Gillette, did any member of the board give an opinion as to what he thought about your grounds at that time? A. There was no opinion at all except—the only opinion actually that I remember them giving at all was when I said that I would not serve as a non-combatant in the Army one of the members sort of gave a sarcastic laugh and said, 'I thought so' and that was all. There was no reason given, there was nothing given. They just well, well, thank you very much. And that was it" (Tr. 26-29) (A. 7-9).

The Local Board summarized Petitioner's appearance in the following words:

"Registrant stated his conscience would not let him fight in Vietnam.

Registrant also stated he could not honestly say he would not defend his country if it were attacked. He very well might fight in respect to the country being attacked.

His main source of information which brought about these beliefs was from the news media in respect to publications on the war.

Registrant is opposed to military service in the case of the *Vietnam* War.

Registrant formed his beliefs in the past 2 years or so and is more or less a result of the Vietnam war" (A. 44).

The board refused to reopen the classification and retained Petitioner in a 1-A status.

Petitioner filed a timely appeal with the State appeal board which declined to overrule the local board's determination.

Petitioner appeared for a physical examination on November 14, 1967 and was ordered to report for induction on December 14, 1967. He failed to report on the day designated and on December 27, 1967 he sent the following letter to the board:

> "Dear Sirs,
>
> In answer to your letter of December 22, I did not appear for induction as scheduled because of reasons stated in my application as a Conscientious Objector. These reasons are, that on the basis of individual conscience (as set forth in the Nuremberg Charter), I cannot serve in support of war. In particular the war in Vietnam, which I feel is unjust and illegal. Fundamental questions of life: the infliction of pain, suffering or death on other people, is to me, against all principles of my Humanist belief. I believe that the development of ethical values should be a persons supreme aim in life. This belief is basic in the lives of many individuals and of The Society for Ethical Culture.
>
> Each individual faces a personal dilemma many times in his life, but surely if ones life is a whole and is not compartmentalized, he must live by the same values which support and answer these fundamental questions: by what right may I take anothers life, or destroy his family and home? The only moral or religious reality for me, is to answer that I cannot" (A. 32).

Petitioner was indicted on February 3, 1969 for failing to report for induction. He was tried by a jury before

Judge Inzer B. Wyatt of the Southern District of New York, found guilty and sentenced to two years imprisonment. The conviction was affirmed by the court of appeals on January 9, 1970.

Summary of Argument

I.

Petitioner in the instant case is a humanist objector to war who is indistinguishable in many ways from Daniel Andrew Seeger (*United States* v. *Seeger*, 380 U.S. 163 (1965)), and Elliott Ashton Welsh (*Welsh* v. *United States*, 398 U.S. 333 (1970)). All three came from non-pacifist backgrounds, were sincere and ethical objectors to war and thought thoroughly about the relation of politics to their ethical ideas. The only difference between Gillette, Seeger and Welsh is that Gillette framed his conscientious objection to war in terms of the Vietnam War, the specific war he was then being drafted into. However, neither the thrust of the *Seeger* or *Welsh* cases, nor the words of Section 6 (j) of the Military Selective Service Act, nor the requirements of the Constitution can allow Gillette's conscientious objector claim to be denied while those of Seeger and Welsh were granted.

In the *Seeger* case this Court broadly construed the term "Supreme Being" then found in Section 6 (j) and in *Welsh* it gave a broad reading to "religious training and belief" in order to avoid serious constitutional doubts concerning that section of the law. Similar constitutional problems require a broad reading of "participation in war in any form" so that Section 6 (j) would cover individuals like Gillette who

conscientiously object to the war they are then being faced with. Some federal courts have already taken the position that a person who claims he would fight if the United States were invaded can nevertheless be entitled to conscientious objector status. See *United States* v. *Owen*, 415 F.2d 383 (8th Cir. 1969); *Miller* v. *Laird*, 3 SSLR 3146 (N.D. Calif. April 28, 1970). Many other federal courts have permitted Jehovah's Witnesses to be conscientious objectors despite the fact that they would fight in a theocratic war ordained by God. See *Sicurella* v. *United States*, 348 U.S. 385 (1955); *Kretchet* v. *United States*, 284 F.2d 561 (9th Cir. 1960); *Taffs* v. *United States*, 208 F.2d 329 (8th Cir. 1953). In the *Taffs* case the court construed the phrase "in any form" to modify the word "participation" rather than the word "war," a reading which would clearly permit conscientious objection status to individuals like Petitioner who object to any form of participation in the Vietnam War.

Since individuals like Gillette are not being faced with an invasion of the United States or a United Nations sanctioned war or World War II, the fact that their consciences would allow them to fight in these wars should not be sufficient to deny them conscientious objector status with respect to the war they are being faced with, namely the Vietnam War. It is the present war that Section 6 (j) is concerned with, not the past or the unknown future. Therefore, sincere and conscientious scruples against participating in the immediate war a registrant is then confronting should justify conscientious objector status.

Nor is such sincere opposition to the Vietnam War only a political decision. This Court made clear in *Welsh*

that political considerations may be a valid component of conscientious objection to participation in war. Merely because political considerations play a role in the ethical evaluation that leads to conscientious opposition to war or a particular war, that does not mean that the required moral or religious compulsions justifying 1-O status are not present.

II.

To construe Section 6 (j) as covering only the traditional pacifists who object to all wars would be a violation of the Establishment Clause of the First Amendment. This Court's decisions in *Sherbert* v. *Verner,* 374 U.S. 398 (1963); *Torasco* v. *Watkins,* 367 U.S. 488 (1961), and *Abington School District* v. *Schempp,* 374 U.S. 203 (1963) make clear that the government cannot pass any laws which aid any particular religion or all religions against non-believers. Once Congress has recognized that one particular religious sect is entitled to conscientious objector status all other individuals similarly inspired must be similarly treated.

Furthermore, the Free Exercise Clause of the First Amendment requires that individuals like Gillette be given conscientious objector status. There is no question that many religions follow the "Just War" doctrine which requires an individual to make an ethical evaluation of the particular war he is being required to participate in. The same ethical considerations apply when just war adherents or humanist objectors such as Gillette make their moral decisions about a particular war as when a Quaker decides he cannot fight in any war. All these individuals must be allowed to exercise their religion freely. Restrictions have

been imposed on the free exercise of religion only when affirmative acts required by the religion had been thought to affect adversely society's health or morals. No such problem is presented here. Individuals such as Gillette are asking only that they should not be required to kill.

Three recent district court decisions, *United States* v. *McFadden*, 309 F. Supp. 502 (N.D. Calif. 1970); *United States* v. *Bowen*, 2 SSLR 3421 (N.D. Calif. Dec. 24, 1969); *United States* v. *Sisson*, 297 F. Supp. 902 (D. Mass. 1968) have analyzed the problem in the manner noted above and have granted conscientious objector status to individuals such as Gillette who expressed conscientious scruples concerning the particular war they were faced with.

III.

Historical evidence and recent constitutional development make clear that conscientious objector status is of constitutional dimension and should be given the broadest possible protection by this Court.

Conscientious objector protection was afforded to members of the peace sects from the earliest Colonial times. Furthermore, many states included such protection in their constitutions framed during the Revolutionary War era, indicating the importance of this right. Four states recommended amendments to the federal Constitution specifically to protect conscientious objectors. When James Madison introduced the Bill of Rights into the First Congress he included a conscientious objector clause in the provision that became the Second Amendment. The reason such a clause was not adopted was to protect the rights of conscientious objectors rather than restrict them. Most states

already had generous provision for such objectors and it was felt a uniform federal rule would hurt rather than help such objectors.

This Court's recent interpretation of the Establishment and Free Exercise Clauses shows that Congress could not deny conscientious objector status to Quakers or other members of the peace churches. Such a denial would impose an unnecessary burden on religion not justified by an overriding government interest. But once the right is recognized for Quakers or Jehovah's Witnesses the Establishment Clause requires that all other citizens similarly inspired must be similarly treated.

IV.

No other competing government interest can justify denial of conscientious objector status to individuals in Petitioner's position. There is no danger of a multiplicity of claims arising. Although the *Seeger* and *Welsh* cases were supposed to open the flood gates for conscientious objector claims, the number of individuals in 1-O or 1-W status has remained extremely low. This Court's decision in *Sherbert* also indicates that the purported danger of false claims is not a sufficient basis for restricting the recognition of conscientious objection.

The morale and efficiency of the armed forces would be increased by the grant of conscientious objector status to individuals like Gillette since the presence of sincere objectors in the army creates severe discipline and morale problems.

Nor would the grant of 1-O status to so-called selective objectors lead to a disrespect for law in our society. The

conscientious objector right has been a very particular relief from the requirements of law and a specific alternative burden has generally been imposed on those requesting that status. Furthermore, there is a distinction between restraining a citizen from doing an act which he feels is required by his religion and compelling him to do affirmative acts which he regards as unconscientious and immoral.

ARGUMENT

I.

Welsh v. *United States*, 398 U.S. 333 and *United States* v. *Seeger*, 380 U.S. 163 require reversal of the conviction below.

A. *The Facts of the Instant Case Are Virtually Identical to* Seeger *and* Welsh

Petitioner Guy Porter Gillette stands in the same posture as Daniel Andrew Seeger (*United States* v. *Seeger*, 380 U.S. 163 (1965)) and Elliott Ashton Welsh (*Welsh* v. *United States*, 398 U.S. 333 (1970)). All three young men did not belong to a historic peace church, nor did they formally attend any church in their young manhood. When they registered for the draft none had come to accept pacifist principles and none applied for conscientious objector status. Petitioner Gillette, like Seeger, held a 2-S deferment for the period of time he was in school and like Seeger applied for 1-O status only as the 2-S deferment was drawing to an end. (Welsh had been permitted to travel abroad for a year by his draft board and immediately on his return applied for conscientious objector status.) All three men filled out the SSS Form 150, claim-

ing that their consciences would not permit them to participate in the war.

Seeger described his belief as rooted in a devotion "to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed." 380 U.S. at 166. He wrote further: "It is our moral responsibility to search for a way to maintain the recognition of the dignity and worth of the individual, the faith in reason, freedom, and individuality, and the opportunity to improve life for which democracy stands." *United States* v. *Seeger*, 326 F.2d 846, 848 (2d Cir. 1964). Welsh wrote in his original application:

> "I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being. This belief (and the corresponding 'duty' to abstain from violence toward another person) is not 'superior to those arising from any human relation.' On the contrary: *it is essential to every human relation.* I cannot, therefore, conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant." 398 U.S. at 343.

He later wrote in a letter to his appeal board: "I believe both ethical and religious values usually arise from the same source: the individual's concern for other individuals." *Welsh* v. *United States*, 404 F.2d 1078, 1091 (9th Cir. 1968).

Similarly, Petitioner wrote in his SSS Form 150:

> "Religion, to me, means the devotion of man to the highest ideal that he can conceive. A respect for the dignity and worth of every human being and a capacity to enter into decent and just and loving relations with other human beings, is not dependent upon being a

> member of a specific Religious Sect or organization" (A. 27).

In his final letter to his draft board, he wrote:

> . . . on the basis of individual conscience (as set forth in the Nuremberg Charter), I cannot serve in support of war. In particular, the war in Vietnam, which I feel is unjust and illegal. Fundamental questions of life the infliction of pain, suffering or death on other people is to me, against all principles of my Humanist faith . . . by what right may I take anothers life, or destroy his family and home? The only moral or religious reality for me, is to answer that I cannot (A. 32).

Petitioner like Welsh was troubled and concerned by problems of world politics which played a role in developing his conscientious objection to war. Thus Welsh wrote to his draft board:

> "I can only act according to what I am and what I see. And I see that the military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to 'defend' our 'way of life' profoundly change that way of life. I see that in our failure to recognize the political, social, and economic realities of the world, we *as a nation*, fail our responsibility *as a nation*." 398 U.S. at 342.

Seeger had similarly written to his local board.

> "My decision arises from what I believe to be considerations of validity from the standpoint of the welfare of humanity and the preservation of the democratic values which we in the United States are struggling to maintain. I have concluded that war, from the practical standpoint, is futile and self-defeating, and that from

the more important moral standpoint, it is unethical." 326 F.2d at 848.

In the same vein, Petitioner in his initial letter to his board expressed similar ideas:

"I am requesting the classification of conscientious objector on the basis of the following reasons:

1) I believe that the United States government is using all the brutal instruments of modern war against a poor peasant population which simply claims the right to have a government of its own free choice. . . .

2) I object to any assignment in the United States Armed Forces while this unnecessary and unjust war is being waged, on the grounds of religious belief specifically "Humanism". This essentially means respect and love for man, faith in his inherent goodness and perfectability, and confidence in his capacity to improve some of the pains of the human condition.

Religion of Humanity: "holding that mans duty is chiefly or wholly comprised in the advancement of the human race."—The Oxford Universal Dictionary.

I would like to request that you send me a Form 150" (A. 23-24).

The sincerity of the beliefs of the three young men is also clear. The sincerity of both Seeger and Welsh was found by Hearing Officers of the Department of Justice under the procedures for processing conscientious objector claims then in force. (See 380 U.S. at 167 and 398 U.S. at 337).

Petitioner's sincerity was testified to by six letters submitted on his behalf when he filed his C.O. claim. (See A. 33-42). One family friend wrote:

"I have seen Guy, Jr., grow from adolescence to young manhood. He has always impressed me, even as a youth, as someone with strong, heartfelt convictions and I have no doubt of his sincerity as a conscientious objector.

It is possible that I in no small measure contributed, unwittingly, to his feelings. I served in the Second World War in the U.S. Army Air Force. Guy and his younger brother were a fascinated audience for my stories about my war experiences—which were far from pleasant and included almost two years of imprisonment by the Germans, as well as being bombed by U.S. planes. Looking back, now, I realize how graphic I was about the horrors and, in many ways, the futility of war (A. 41).

Another friend wrote:

"I have known Guy Gillette, Jr. and his family for 10 years. In that time I have seen Guy mature; he is a thinking, feeling young man who reflects the kind of home in which he grew up. The influence of his parents is obvious. They have inculcated an awareness—and concern—for the world around him. I consider him to be a compassionate human being, sensitive to the rights of others, involved with his fellow man" (A. 38).

A third said:

"I have been acquainted with Guy for a number of years on a social level, being friends of the family; and also on a business basis with his father. Therefore I feel qualified to give an appraisal of his honesty; and I firmly believe in his sincerity with respect to the crucial question of participation in this war" (A. 37).

Two ministers also wrote in support of his claims. One noted:

> "I have known this youth all of his life—I Baptised in infancy. I have known his parents for a little longer and I find this family sincere and loyal in all their dealings.
>
> I am amazed at young Guy's thought on the subject of Pacificism as expressed in his answers to salient questions. It shows real concern for Christian neighbors, a great deal of hard study and soul-searching. It is true it might be based on a deeper and more historical religious conviction; but the Humanist position is succinctly put" (A. 40).

The other minister, a former military chaplain, wrote even more strongly:

> "His objection on the basis of religious conviction, I believe to be secondary but of longer standing and of more significance. And again, I would disagree with the conclusions to which he, in good conscience and to the best of his ability, has come. Yet in my twenty years as a chaplain in the military service, and consultations on the subject of conscientious objection, I have seldom encountered a more earnest and selflessly honest soul-searching appraisal. It is devoid of any thought of evasion of duty, expediency or personal consideration. Nor does it involve pacifism as a social or political technique, or the authority of an organized religious body. Rather, it is based on a fundamental regard for human life as sacred which he feels conscience-bound to uphold. The basic evil of war to impersonalize and destroy this ultimate evaluation of human life, I feel, is the motivating source for his conscientious objection" (A. 34).

The local board in denying Petitioner's claim for C.O. status never questioned his sincerity.[1] The summary of

his appearance before the board made clear that they focused only on his objection to the Vietnam War. Judge Wyatt also specifically found that *"aside from any question of sincerity,* the views of the defendant were primarily, if not entirely, based on an opinion, a feeling, a belief, that the Vietnam war is immoral and unjust" (Tr. 42) (A. 12). There is no evidence or any suggestion at any stage of the Selective Service proceedings that Petitioner did not sincerely hold to the beliefs he was expressing in his conscientious objector claim.[2]

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[1] The initial determination by the board was made on June 21, 1967, under Section 6 (j) of the Universal Military Training and Service Act of 1951; Petitioner's personal appearance took place on August 8, 1967 after Section 6 (j) had been amended by the Military Selective Service Act of 1967 to eliminate the "Supreme Being" language. It is clear that the change in language had no substantial effect upon the test to be applied. Senator Richard Russell, chairman of the Senate Armed Services Committee and a member of the Senate-House conference committee stated:

> "In my opinion, the conference report goes in the direction of confirming the decision of the Supreme Court [in *Seeger*] ... I think that a change in [the *Seeger*] decision was an objective of the House. However, we did not accept that provision as it came from the House.
>
> "I merely wish to have the Record show for the legislative history that the Senate conferees are not of the opinion that the new definition overrules [*Seeger*]." 113 *Cong. Rec.* S 8054 (daily ed. June 12, 1967).

[2] "Some affirmative evidence indicating insincerity or bad faith must be shown in order to rebut [a] claim [of conscientious objection]". *United States* v. *Owen,* 415 F.2d 383, 389 (8th Cir. 1969). In order to sustain a denial on the grounds of insincerity there must be a definite finding of disbelief of the registrant. *United States* v. *James,* 417 F.2d 826 (4th Cir. 1969); *Goodwin* v. *Laird,* —— F. Supp. ——, 3 SSLR 3151 (N.D. Calif. June 19, 1970); specific reasons justifying a conclusion of insincerity must be offered by the local board, *United States* v. *Broyles,* 423 F.2d 1299 (4th Cir. 1970); *United States* v. *Haughton,* 413 F.2d 736 (9th Cir. 1969); *United States* v. *St. Clair,* 293 F. Supp. 337, 341 (E.D.N.Y. 1968).

To summarize, Seeger, Welsh and Gillette came out of non-pacifist backgrounds, none applied for C.O. status at the time of registration, they were all ethical objectors to participation in war; the traditional anthropomorphic God had no place in their thought; political ideas formed an important basis for their conscientious scruples about war; and they held their beliefs sincerely.

The only difference between the three cases is that Gillette framed his responses and marshalled his arguments with respect to the specific war he was then facing, that is, the Vietnam War. (When Seeger applied for C.O. status in 1957 and Welsh did the same in April, 1964, they were not faced with the concrete problem of a specific war.) But there is no doubt that Gillette's humanistic beliefs "occupie[d] in [his] life . . . a place parallel to that filled by the God of those ultimately qualifying for the exemption . . . " just as with Seeger, 380 U.S. at 176. These beliefs were "in his own scheme of things, religious," *id.* at 185, that is, they played the role of a religion and functioned as a religion in his life, even to the point of his risking jail to follow them. Furthermore, as in *Welsh,* Gillette's opposition to war stemmed from his moral, ethical and religious beliefs about what is right and wrong. Even though they were "purely ethical and moral in source and content" they imposed "upon him a duty of conscience to refrain from participating" in the war he was then faced with. 398 U.S. at 340.

But Gillette's conscientious objection to the Vietnam War is not a sufficient basis for distinguishing *Welsh* and *Seeger.* As Petitioner testified, he had initially expressed to the local board a conscientious objection to all war. When pressed about the war in Vietnam, he readily agreed

that he was opposed to that war "because that's the war I am faced with" (Tr. 26) (A. 7). Although he answered hypothetical questions about a supposed invasion of the United States or a war sanctioned by the United Nations, he was not faced with those alternatives. He opposed what he was asked to do—to accept induction into a military force fighting a specific war—on the basis of humanistic, conscientious, "religious" beliefs, deeply rooted in his background. There can be no question that his conscience "spurred by deeply held moral, ethical or religious beliefs, would give [him] no rest or peace if [he] allowed [himself] to become a part of an instrument of war." *Welsh, supra,* 398 U.S. at 344. For the reasons noted below, this cannot be a sufficient basis for distinguishing *Welsh* or *Seeger* either as a matter of statutory construction or constitutional interpretation.

B. *Section 6 (j) Must Be Interpreted to Cover Conscientious Objection to the Military Service Facing the Registrant*

Petitioner urges that the words "conscientiously opposed to participation in war in any form" in Section 6 (j) must be construed to cover individuals such as himself who are conscientiously opposed to the war they are then being drafted into, but whose consciences would allow them to fight in other wars, such as one to repel an invasion or one sanctioned by the United Nations.

This Court in *Seeger* specifically interpreted the term "Supreme Being" in 6 (j) to mean more than the orthodox God. It included "a broader concept of a power or being . . . 'to which all else is subordinate' . . . " 380 U.S. at 174. In a concurring opinion, Justice Douglas pointed out that

such an interpretation was probably necessary "to save [the law] from demise on constitutional grounds" and to avoid "a serious constitutional doubt" under the Free Exercise Clause of the First Amendment and the Due Process Clause of the Fifth Amendment. 380 U.S. at 188. Similarly Justice Harlan in *Welsh* characterized the plurality opinion of Justice Black as an attempt to "[read] out of [the law] any distinction between religiously acquired beliefs and those deriving from 'essentially political, sociological, or philosophic views or a merely personal moral code.'" 398 U.S. at 351. Justice Harlan construed the law to grant conscientious objector status only to those adhering to theistic religious beliefs. However such an interpretation, he concluded, runs afoul of the Establishment Clause and is "that kind of classification that this Court had condemned." 398 U.S. at 357-58.

In the instant case the same problem is presented. To construe Section 6 (j) in such a way as would cover Welsh, Seeger and traditional pacifists but to exclude Gillette, whose beliefs may be as sincere and deeply held as the most religious of Quakers, offends not only the Free Exercise and Establishment Clauses but the Due Process Clause as well. (See Point II below). The terms "conscientiously opposed to participation in war in any form" found in Section 6 (j) must therefore be interpreted to include all those sincerely opposed to the compulsory military service they are then facing.

Moreover, the same reasons that led this Court in *Seeger* to construe broadly the term "Supreme Being" and in *Welsh* to construe broadly "religious training and belief" should lead to a broad reading of "participation in war in any form." This Court recognized that the inner compul-

sions that forbid men to enter the armed services are not found only in Quakers or Jehovah's Witnesses. This Court's decisions in *Seeger* and *Welsh* are based on an awareness of an evolving moral sense that inspires certain men from all ethical backgrounds to avoid lending their bodies to the uses of war.

The interpretation of Section 6 (j) urged by Petitioner has been accepted by a number of federal courts. In *United States* v. *Owen,* 415 F.2d 383, 390 (8th Cir. 1969) the defendant was asked, just as Gillette was asked, "If your country were invaded, would you change your mind?" Owen allegedly stated, "Yes, it is possible that I would." Although there was some dispute as to whether Owen made the comment or not, the Court said, "Even if we take the transcript prepared by the board clerk as a true reflection of Owen's reply, it does not supply a basis in fact for the appeal board's classification, *as it clearly relates to a contingency* and provides no inference as to Owen's state of mind when the incident occurred" (emphasis added).

In the same way, Gillette's willingness to fight in other wars "relates to a contingency and provides no inference as to [his] state of mind" when he applied for conscientious objector status. As he explained later,

> "they asked me if I was opposed to all war and I said yes, that I was. Then they said, but are you specifically opposed to the war in Vietnam. I said I am, yes, because that's the war I am faced with. That's the only war that I have to contend with at the time. I don't have to worry about any other war so I said yes, I am opposed to the war in Vietnam" (Tr. 26) (A. 7).

In a more recent case in the Northern District of California, *Miller* v. *Laird,* —— F. Supp. ——, 3 SSLR 3146 (N.D. Calif. April 28, 1970) an Army Reservist sought discharge as a conscientious objector. An army hearing officer claimed that the petitioner had expressed a willingness to fight to repel invaders and therefore he rejected petitioner's application. The court held:

> "the court does note that one of the primary allegations of the hearing officer, even if true, is no ground for denying petitioner's claim. The hearing officer states that petitioner said he would fight to repel invaders. The question of whether one can be a conscientious objector and be committed to fighting an invasion has been dealt with in other cases. In *United States* v. *Owen,* 415 F.2d 383, 390 (8th Cir. 1969), the defendant stated that it was possible that he would fight if his country was invaded. The court held that this established no basis in fact as it 'clearly relates to a contingency and provides no inference as to Owen's state of mind when the incident occurred....'
>
> The Ninth Circuit in *United States* v. *Haughton,* 413 F.2d 736, 742 (9th Cir. 1969), states that a man was a conscientious objector even though he believed in the use of force 'to protect the community.' See also *United States* v. *Purvis,* 403 F.2d 555, 563 (2d Cir. 1968)."[3] 3 SSLR at 3148.

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[3] In *United States* v. *Haughton,* 413 F.2d 736 (9th Cir. 1969) the registrant claimed that he believed in the use of force by the police "to protect its citizens from themselves . . . a police force is limited to protecting the community from a few individuals." He also agreed that it was "morally justifiable to shoot a person who was about to kill a friend of mine." More generally force or violence was justifiable if it is "the sole method of stopping said individual or group from committing an act that to me is morally worse than said act of force." 413 F.2d at 740-41. The government again argued that this position was inconsistent with an

This position is also confirmed by a series of cases involving Jehovah's Witnesses in some of which courts have construed the phrase "in any form" to modify the word "participation" rather than the word "war." If this construction is sustained, then Petitioner's conviction must be reversed, for the record clearly demonstrates his conscientious objection to any form of participation in the Vietnam War. The logical necessity for such a construction was noted in *Taffs* v. *United States,* 208 F.2d 329 (8th Cir. 1953), *cert. denied,* 347 U.S. 928 (1954), which dealt

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objection to participating in war. But the Court rejected that contention.

> Haughton's willingness to use force to protect the community or to stop another from taking a life is consistent with conscientious objector status. 413 F.2d at 742.

In *United States* v. *Purvis,* 403 F.2d 555 (2d Cir. 1968) the registrant answered question II (5) of SSS Form 150 ("Under what circumstances, if any, do you believe the use of force") in the following way:

"I believe in the use of force only if it is used as the only alternative to restrain an individual from doing wrong, but not used to indiscriminately kill." 403 F.2d at 563. The government argued that the answer showed a lack of objection to participation in war. But the court rejected that interpretation:

> Agreement that force can be used to restrain wrongdoing, especially as the last alternative, has little bearing on an attitude toward war. We would not expect a full-fledged conscientious objector to stand by while a madman sprayed Times Square with machine gun bullets, or while an assassin took aim at the President. 403 F.2d at 563.

In addition, the decision in *Fleming* v. *United States,* 344 F.2d 912 (10th Cir. 1965), seems to have granted an exemption to one who believed that some wars are permitted. Though he thought "love and positive forces" would usually be effective to eliminate war, he added that "force should be used only as a final alternative and under fair circumstances." 344 F.2d at 914. Expressly adverting to defense of country, the defendant in *Fleming* stated that "self-defense of a people would not involve war but protection against a smaller group which could not be reconciled by intelligence and positive forces." *Ibid.*

with the treatment to be accorded to a Jehovah's Witness who conceded that he would fight in a war ordained by Jehovah. The court there said:

> ". . . [W]e are inclined to think that Congress did not intend such an unreasonable construction to be placed on this phrase. . . . The words, 'in any form,' obviously relate, not to 'war' but to 'participation in' war. War, generally speaking, has only one form, a clash of opposing forces. But a person's participation therein may be in a variety of forms." 208 F.2d at 331.

The *Taffs* case, *supra,* is only one of a very long line of cases dealing with the proper treatment to be accorded to Jehovah's Witnesses, and to the various views on participation in war which are held by the members of that faith. All of these cases have upheld the right of Witnesses to the status of conscientious objector, notwithstanding their frequent concessions that they would, indeed, gladly take part in a war which they believed to be ordained by their God.[4]

This Court too, has supported the right to conscientious objector status of a Jehovah's Witness who conceded that he would participate "in defense of his ministry, Kingdom interests, and in defense of his fellow brethren."

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[4] See e.g., *United States* v. *Hartman*, 209 F.2d 366, 370-371 (2d Cir. 1954), which employs language almost identical to that quoted from *Taffs, supra; United States* v. *Pekarski*, 207 F.2d 930 (2d Cir. 1953); *Bouziden* v. *United States*, 251 F.2d 728 (10th Cir. 1958); *Jessen* v. *United States*, 212 F.2d 897, 899 (10th Cir. 1954); *Shepherd* v. *United States*, 217 F.2d 942 (9th Cir. 1954); *United States* v. *Close*, 215 F.2d 439, 442 (7th Cir. 1954); *United States* v. *Wilson*, 215 F.2d 443, 446 (7th Cir. 1954); *Mayfield* v. *United States*, 220 F.2d 729 (5th Cir., 1955); *United States* v. *Davila*, 3 SSLR 3089 (5th Cir. July 1, 1970); *United States* v. *Bey*, 3 SSLR 3097 (N.D. Ill. April 29, 1970).

Sicurella v. *United States*, 348 U.S. 385, 388 (1955). Sicurella's right to the exemption was upheld, even in the light of the fact, made clear by the dissenting opinions, that the type of war in which he would participate was not some remote, otherworldly conflict, but any war "... approved by Jehovah, such as the blood and flesh wars of the Israelites." Mr. Justice Reed, dissenting, 348 U.S. at 392-393. A second dissenter in *Sicurella* observed, even more pointedly, that:

> "Petitioner says he is opposed to fighting a secular war but is not opposed to fighting a religious war where the interests of his sect are involved. . . .
>
> ". . . [H]e reserves the right to choose the wars in which he will fight." Mr. Justice Minton, dissenting, 348 U.S. at 394-395.

More recently, in *Kretchet* v. *United States*, 284 F.2d 561 (9th Cir. 1960), *Sicurella* was relied on by the Court to support the claim of a Jehovah's Witness whose willingness to fight in earthly wars was even more manifest than that of Sicurella. Kretchet, in the second of his two personal appearances before his local board, ". . . stated that he never claimed to be against war in any form, [and] that he believed in theocratic warfare commanded by God. . . ." 284 F.2d at 564. In addition, the Court noted, at his personal appearance before a Justice Department hearing officer, on the second of his two appeals, Kretchet stated clearly ". . . that if Jehovah, or someone believed to be speaking for Jehovah, ordered him to slay now or to participate in war now, he would participate in such a war and that in such participation he would use such carnal weapons as were available to him in order to carry out Jehovah's commandments." *Id.*

There could hardly be a clearer indication than the Court's approval of Kretchet's views as qualifying him for conscientious objector status, that the proper construction of the phrase "opposed to participation in war in any form" must be taken to mean opposition to any form of participation in wars which the individual believes contrary to the commands of his religion.

The idea that conscientious objection to the single war then facing the registrant was not a sufficient basis for a C.O. claim seems to have originated in a misreading of dictum in a single case, *United States* v. *Kauten*, 133 F.2d 703 (2d Cir. 1943). Judge Augustus N. Hand had already reached the main holding of the case, that Kauten, an objector to all wars whose beliefs were politically founded, was not entitled to conscientious objector status, when he wrote in dictum that conscientious objection:

> "... must ex vi termini be a general scruple against 'participation in war in any form' and not merely an objection to participation in this particular war." 133 F.2d at 707.

But the significance of this statement can only be understood in light of the following, which reveals the type of "selective" objection to which Judge Hand was referring:

> "There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. . . . The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has al-

ways been thought a religious impulse." 133 F.2d at 708.

Since Kauten was an objector to all wars—albeit a non-religious objector—the foregoing dictum merely reflects Judge Hand's suggestion that a nonuniversal pacifist is less likely to be religious as the term was then understood. But just as surely, it can hardly be denied, there is also a vast "distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous," and a deeply-felt religious belief that leads an individual to object conscientiously to participation in the particular war he is being faced with. The latter is the position of the Petitioner, and it is hardly described in Judge Hand's words. Furthermore, in the light of this Court's holding in *Welsh* that political considerations may validly play a role in an application for conscientious objector status, the authority of the *Kauten* case is even more questionable.

Gillette's willingness to defend his country if attacked is consistent with conscientious objector status. So long as the *Seeger* and *Welsh* tests are met, so long as his opposition to that war stems from his moral, ethical or religious beliefs about what is right and wrong and these beliefs are held with the strength of traditional religious convictions, so long as his consicence, "spurred by deeply held moral, ethical or religious beliefs, would give [him] no rest or peace" if he became an instrument of that war, he is entitled to 1-O status.

Whatever controversy may exist about selective conscientious objection in other cases is not present here. The question is not whether registrants like Gillette should be

allowed to pick and choose the wars they wish to fight in and those they would avoid. To the extent that a registrant frames his response to a conscientious objector questionnaire in those terms, he may be indicating that his objection to war rests upon considerations of "policy, pragmatism or expediency," 398 U.S. at 343, which the decisions of this Court exclude as a basis for C.O. status. But if his conscience dictates that he refuse to participate in the war that his draft board is then drafting him into, he is not in any sense "selecting" his war. Hypothetical questions about World War II or a United Nations-sanctioned war are of questionable utility in determining his sincerity or the basis of his deeply-held beliefs, anymore than questions about a God-ordained war are proper in determining the beliefs or sincerity of a Jehovah's Witness. They clearly "relate to a contingency" he is not then facing, as the court said in *Owen*, 415 F.2d at 390. Only if in fact a person were actually confronted with two wars, for example, a war in Vietnam which he conscientiously opposed and an American-involved war in Israel which he could be sent to and would fight in, would the problem of "selective" conscientious objection arise. But if a registrant cannot select any other war because it occurred in the past (as World War II) or may hypothetically occur in the future (as a conceivable attack on United States territory) then he is in no sense a selective conscientious objector.[5]

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[5] In a recent decision in Australia, *The Queen* v. *District Court of the Northern District of Queensland and Others; Ex parte Thompson* (1968) 42 A.L.J.R. 173, two members of the High Court came to the same interpretation. Section 29A (1) of the Australian National Service Act exempted those holding conscientious beliefs against "any form of military service." Because of the wording of that law, the High Court concluded that an appli-

One observer has pointed out that a registrant asked about other kinds of wars:

> ". . . may only be refusing to answer dishonestly a series of hypothetical questions: He does not know what he would do if an invading army threatened his family and community. He was too young to face a decision to enter the armed forces in World War II; he cannot be sure he would have refused to use violence against Hitler. All he can know with certainty is that his deepest convictions tell him that for him to kill in today's war, or to participate in institutions that support this conflict, would be wrong and that it would be wrong as well for him to let his government decide this matter for him.
>
> The heart of the matter is not whether an individual's conscience has been tutored by religion, for great numbers of the men who are inducted have been subjected to religious training similar to that of the objector and the inductees come from every one of the nation's traditional denominations. Nor is it whether

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cant must object to being engaged in "military service at all," that is, at all times and places.

However two of the five judges took a broader view in dissent, analyzing the problem in the manner noted above: McTiernan, J. commented:

> "If the inner convictions of what is morally right and morally wrong which a person holds do not allow him to engage in any such act *at the time of his application for exemption*, then, in my opinion, his conscientious beliefs do not allow him to engage in any form of military service within the meaning of s. 29A of the Act . . . In my opinion a person's convictions of moral rightness and wrongness could be such as to give rise to a conscientious belief that any act done by him in any capacity as the result of his obligations as a member of the military forces of the Commonwealth *at a particular time* is contrary to such convictions because of his contribution towards or liability to participate in a particular activity of those forces *at that time*." *Ibid.* 176-177. (Emphasis added.)

See also the opinion of Menzies, J. *Ibid.* 178.

the objector would take the some position with respect to every conceivable armed conflict, for he is usually a young man who has not had occasion to face and think through that many possibilities.

The heart of the matter—the circumstance that must govern the granting or denying of an exemption—is whether what conscription commands of the registrant at the present moment is, for him, a wrong that would do violence to his integrity, a wrong for which the command of government will not relieve him of personal responsibility.

There are sound reasons for exempting such objectors. It makes sense to do so because an attempt to force a man to violate such scruples would be destructive of his personality and demeaning to the government that made the attempt. It makes sense as well because his forced induction would contribute no advantage to the morale and effectiveness of the armed forces, while his imprisonment would be unnecessarily costly to both him and society." Pemberton, "Equality in the Exemption of Conscientious Objectors," Tax, ed. THE DRAFT, 67-68 (1967).

Law, reason, and the Constitution therefore require that a draft board's inquiry into conscientious objection focus on three points: (1) whether the registrant's beliefs are deeply and sincerely held; (2) are these beliefs religiously, morally or ethically binding upon him; (3) do those beliefs require a registrant not to participate in the war in which the government seeks to compel his service. If the answer to those question is "yes", as they clearly are in Gillette's case, he is entitled to conscientious objector status.

C. *The Court Below Improperly Construed Gillette's Conscientious Opposition to Participating in the War in Vietnam as Solely a Political View.*

Both the District Court and the Court of Appeals misconstrued the argument advanced by Petitioner in his conscientious objector claim. The Court of Appeals stated that

> "We reaffirm our holdings in United States v. Mitchell, 369 F.2d 323 (2d Cir. 1966) and United States v. Bolton, 192 F.2d 805 (2d Cir. 1951) that allegations that a particular employment of the armed services is in violation of the Constitution, international treaties or a moral code do not raise a defense to a prosecution for failure to report for induction into the armed forces. For these reasons Gillette cannot successfully challenge the legality of the war in Vietnam in these proceedings." 420 F.2d at 299.

The court's comments relate only to a draftee's *standing* to challenge the legality of the Vietnam War in a prosecution for failure to report for induction. Nevertheless the court came back to the same point when it discussed Gillette's C.O. application, citing the same cases it had relied on for its earlier point.

> "The mere potentiality, arising upon his induction, that Gillette would have to violate his conscientious objection to service in Vietnam is not sufficient to outweigh the application of this exercise of Congressional power to him. See United States v. Henderson, *supra;* United States v. Bolton, *supra. Contra,* United States v. Sisson, *supra,* 297 F. Supp. at 906-911." 420 F.2d at 300.

Similarly Judge Wyatt made the following comments about Gillette's views:

"I do believe that from what was before the board there was a basis in fact for a conclusion by the board that aside from any question of sincerity, the views of this defendant were primarily, if not entirely, based on an opinion, a feeling, a belief, that the Vietnam War, is immoral and unjust" (Tr. 42) (A. 12).

Both courts in their analysis thus confused three separate problems:

(1) the political use of the armed forces which a draftee does not have standing to question since he may not be sent to the war theater involved;

(2) political pragmatism or expediency, as, for example, when a registrant's sole basis for claiming C.O. status is that a war is opposed by his political party;

(3) the political perceptions upon which a valid conscientious objection claim can be based.

A recent law review note commenting on *United States* v. *Sisson*, 297 F. Supp. 902 (D. Mass. 1968), appeal dismissed, 399 U.S. —— (1970) focused on the problem of political beliefs motivating a conscientious objector and noted the difference between the last two points:

"Though Sisson's beliefs seem to be religious in the *Seeger* sense, it has been suggested that opposition to a particular war is, at least usually, a political decision. To see that this is not universally true, one has only to look to a Catholic who applies his church's traditional doctrine of the just war in determining that he must not participate in a particular conflict. The case of a man like Sisson, who holds respect for human life as a central value in his life, and sees the effect of American participation in Vietnam to be antithetical to this value, should be equally strong. Both of these

men base their objection on fundamental beliefs that, in *Seeger* terms, occupy in their lives a place equivalent to that which the beliefs of an orthodox general objector occupy in his. And each of these men—Sisson, the just-war Catholic, and the orthodox objector—is equally injured when the state seeks to compel them to act in opposition to their fundamental beliefs. If almost all selective objectors based their objections on political grounds, it might be justifiable to adhere to the test of objection to 'participation in war in any form' in order to have a simple administrative test that would be accurate in almost all cases. But given an increasingly well educated population influenced by increasingly sophisticated and heterodox moral and religious doctrines, a court is no longer justified in assuming that very few young men carry out the complex ethical analysis that leads to a conscientious objection limited to a particular war." Comment, "Nonestablishment of Religion," 83 *Harv. Law Rev.* 453, 457-58 (1969).

Obviously, Petitioner is not urging that there is a constitutional right to be exempt from military service in a particular war for one whose objection to that war is based on the fact that it is opposed by his country's political allies; or whose objection is based on his view that it will improve foreign trade with a neutral power; or whose objection is posited on a favoring of certain political or economic or cultural conditions in the country with which we are at war over our own. These are clearly political objections.

But that is not the end of the inquiry. The most religiously sensitive conscience will make so-called "political" judgments, when it passes on political affairs. See, *e.g.*, the works of Martin Buber, Reinhold Niebuhr, Paul Tillich, the Gospels and the Talmud. Unless conscience is to ab-

dicate its responsibilities where public matters are concerned—a position espoused by no religious or other ethic —"political" judgments are necessarily involved. Indeed, does not the total pacifist's objection to participating in any military service necessarily entail "political" decision-making about the nature of war since total pacifism is consistent with personal self-defense? This does not mean that all political questions are moral or vice versa. Although moral decisions are different from political decisions and it is only the former which demand recognition, political considerations may play a crucial part in the most moral of beliefs.

This court in *Welsh* made clear that conscientious objector status cannot rest on political considerations alone:

> "The two groups of registrants that obviously do fall within these exclusions from the exemption are those whose beliefs are not deeply held and those whose objection to the war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency." 398 U.S. at 342-43.

But political analysis and evaluation may well play a part in the development of conscientious feelings about war:

> "We certainly do not think that [Section] 6 (j)'s exclusion of those persons with 'essentially political, sociological, or philosophical views or a merely personal moral code' should be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy." 398 U.S. at 342.

Thus neither the draft board originally nor either court below properly considered the conscientious objector claim

made by Gillette. They construed his comments as directed to the wisdom of American policy in Vietnam rather than as the stimulus for his conscientious objection to participating in that war. Therefore there is no basis in fact for the 1-A classification given to Petitioner. *United States* v. *Haughton*, 413 F.2d 736 (9th Cir. 1969); *United States* v. *Owen*, 415 F.2d 383 (8th Cir. 1969).

II.

It is unconstitutionally discriminatory, in violation of the First and Fifth Amendments, for a statute to authorize conscientious objector status for total objectors, but to deny such status to Petitioner. Moreover, the establishment and free exercise of religion clauses of the First Amendment should be held to require recognition of Petitioner's claim.

A. *Unconstitutional Discrimination Against Religious Beliefs and Establishment of Religion.*

Assuming *arguendo* that the local draft board correctly interpreted the intent of Congress when it decided that Section 6(j) was intended to grant exemptions only to those whose conscientious objection extends to participation in all wars at all times, the relevant parts of Section 6(j) are clearly unconstitutional.

As shown by Petitioner's SSS Form 150 and the letters submitted in support of his C.O. claim, individuals such as Gillette who express sincere objection to fighting in the war then facing them are no less "religious" (as defined in *Welsh* and *Seeger*) than total objectors. The only difference between universal pacifism and the pacifism repre-

sented by Gillette is in terms of the content of the religious beliefs. (See discussion below at Point IIC.)

It is self-evident that neither an act of Congress, nor a Selective Service System regulation, could purport to recognize the conscientious objector claims of one religious group, but refuse to recognize the claims of one or more other groups or of non-believers altogether. There can be no discrimination between the religious beliefs of Quakers and the religious beliefs of Catholics, Methodists or Humanists or, indeed, between Quakers (or Methodists or Humanists) who are total pacifists and Quakers (or Methodists or Humanists) who are selective objectors.

This Court has established beyond cavil that to grant a benefit to adherents of one religious belief while denying it to those of other beliefs is unconstitutionally discriminatory. *Sherbert* v. *Verner,* 374 U.S. 398 (1963); *Torasco* v. *Watkins,* 367 U.S. 488 (1961). In the *Sherbert* case, the Court said:

> "[I]f the purpose or effect of a law . . . is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect," 374 U.S. at 404, quoting *Braunfeld* v. *Brown,* 366 U.S. 599, 607 (1961).

In *Torasco,* it said:

> "neither a State nor the Federal Government, can constitutionally pass laws . . . which aid all religions as against non-believers and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." 367 U.S. at 495.

Over two decades ago, this Court clearly described what would constitute an improper establishment of religion, in *Everson* v. *Board of Education,* 330 U.S. 1, 15 (1947):

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another."

More recently, the Court has set forth the ideal of religious freedom which the Constitution sought to establish. This ideal is one of

> "absolute equality before the law, of all religious opinions and sects. . . .
>
> "The government is neutral, and, while protecting all, it prefers none, and it disparages none." *Abington School District* v. *Schempp,* 374 U.S. 203, 215 (1963).

The Court has continued to elaborate on the requirements which the First Amendment imposes on the government. Only two years ago, in *Epperson* v. *Arkansas,* 393 U.S. 97 (1968), the Court eloquently stated these requirements in an opinion which bears quotation:

> "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.
>
> "As early as 1872, this Court said: 'The law knows no heresy, and is committed to the support of no

dogma, the establishment of no sect.' Watson v. Jones, 13 Wall 679, 728, 20 L Ed 666, 676. This has been the interpretation of the great First Amendment which this Court has applied in the many and subtle problems which the ferment of our national life has presented for decision within the Amendment's broad command." 393 U.S. at 103-104.

In addition to its violations of the First Amendment, if the Selective Service System denies Petitioner C.O. status, while granting it to others, solely on the basis of an unjustifiable distinction between Petitioner and others on the ground of differences in the content of their religious beliefs, the System is in direct violation of the equal protection guaranty of the Constitution. *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Follet* v. *Town of McCormick*, 321 U.S. 573 (1944); *United States* v. *McFadden*, 309 F. Supp. 502 (N.D. Cal. 1970); *United States* v. *Bowen*, —— F. Supp. ——, 2 SSLR 3421 (N.D. Cal. Dec. 24, 1969); see *United States* v. *Sisson*, 297 F. Supp. 902 (D. Mass. 1969), appeal dismissed, 399 U.S. —— (June 29, 1970). Such denial of equal protection constitutes a denial of due process of law, forbidden by the Fifth Amendment. Cf. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *United States* v. *McFadden, supra; United States* v. *Bowen, supra.*[6]

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[6] A recent law review note on the *Sisson* case supports this analysis:

"Deeming some religious beliefs more worthy of protection for such reasons is exactly the choice forbidden by the establishment clause, since state advancement of one class of religion over another is as objectionable as state advancement of religion generally. These considerations suggest that if Sisson's objection is classed as 'religious,' it violates the establishment clause to grant exemptions to some religious objectors but not to him.

As the court held, however, even if Sisson's beliefs are treated as nonreligious there is an equally serious establish-

Justice Harlan noted in his concurring opinion in *Welsh*:

"having chosen to exempt [any conscientious objector, Congress] cannot draw the line between theistic and nontheistic religious beliefs on the one hand and secular beliefs on the other. Any such distinctions are not, in my view, compatible with the Establishment Clause of the First Amendment. See my separate opinion in *Walz* v. *Tax Comm'n*, 397 U.S. 664, 694 (1970); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968); *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 305 (1965) (Goldberg, J., concurring); *Engel* v. *Vitale*, 370 U.S. 421 (1962); *Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961); *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953). The implementation of the neutrality principle of these cases requires, in my view, as I stated in *Walz* v. *Tax Comm'n, supra*, 'an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the scope of legislation encircles a class so broad that it can be fairly concluded that [all groups that] could be thought to

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ment violation. It could, of course, be suggested in defense of the religious-non-religious distinction that Congress was simply trying to insure the free exercise of religion. So to argue, however, would be to sanction the avoidable pro-religious discrimination in such a policy, involving the sort of preference the establishment clause has been interpreted to forbid. The Supreme Court has read the free exercise clause not in isolation so as to permit state advancement of religion but in connection with the establishment clause so as to require state neutrality insofar as possible. Thus the protection of the first amendment, if given to some conscientious objectors, should extend to Sisson whether or not his beliefs are 'religious.' This conclusion is not altered by his objection being to a particular war, since this limit does not impeach the claim that his objection is a fundamental matter of conscience." Comment, "Nonestablishment of Religion," 83 *Harv. Law Rev.* 453, 461-62 (1969).

fall within the natural perimeter [are included].' 397 U.S. at 696." 398 U.S. at 356-57.

Similarly Justice Douglas, concurring in *United States* v. *Seeger*, stated:

> "If I read the statute differently from the Court, I would have difficulties. For then those who embraced one religious faith rather than another would be subject to penalties; and that kind of discrimination, as we held in *Sherbert* v. *Verner*, 374 U.S. 398, would violate the Free Exercise Clause of the First Amendment. It would also result in a denial of equal protection by preferring some religions over others—an invidious discrimination that would run afoul of the Due Process Clause of the Fifth Amendment. See *Bolling* v. *Sharpe*, 347 U.S. 497." 380 U.S. at 188.

Notwithstanding the clear constitutional commands contained in the above decisions, Petitioner faces a two year jail sentence, an undeniably greater burden than those suffered by the parties in many of these cases. In *Sherbert*, for instance, the deprivations were in a sense hardly serious at all; the only penalty which would have attached to her continued practice of that which she considered required by her Seventh Day Adventist religion would have been a discriminatory loss of state unemployment compensation, not suffered by persons observing Sunday as their holy day.

As stated by the court in *United States* v. *McFadden*, 309 F. Supp. 502 (N.D. Calif. 1970) a decision which upheld the right of a selective conscientious objector to treatment equal to that received by those of other religious beliefs:

> "Such a burden upon the exercise of one's religion can have no place in a society built by men and women

> of all religions and persuasions. And although our history is not free from religious intolerance and persecution, it has always been the ideal of our forefathers to create a country where, as George Washington said: '[t]he liberty enjoyed by the people of these States of worshipping Almighty God agreeably to their consciences, is not only among the choicest of their blessings, but also of their rights.'" 309 F. Supp. at 506.

It may be asserted by respondent that exemption from service as a conscientious objector is not a right, to be protected as are other constitutional rights, but a mere "privilege," granted by the grace of Congress, which may be withheld at will without running afoul of constitutional requirements. (Point III critically analyzes this position).

But regardless of whether or not there is a right, constitutional or otherwise, to have one's conscientious objection to participation in war recognized, it is clear that once Congress has recognized it for some religious beliefs, the Constitution requires equal treatment for all religious beliefs. As the Second Circuit held in *Seeger* v. *United States*, 326 F.2d 846 (2d Cir. 1964), aff'd on other grounds, 380 U.S. 163 (1965):

> ". . . [I]t now seems well-established that legislative power to deny a particular privilege altogether does not imply an equivalent power to grant such a privilege on unconstitutional conditions. See Speiser v. Randall, 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed.2d 1460 (1958). It could hardly be argued, for example, that the ability of Congress to deny an exemption to all conscientious objectors would permit Congress to limit that exemption to objectors of one particular religious denomination." 326 F.2d at 851.

B. *Significance of McFadden, Bowen and Sisson Decisions.*

Three recent decisions by Federal district courts have held that this constitutional doctrine applies specifically to the case of the selective conscientious objector. *United States* v. *McFadden*, 309 F. Supp. 502 (N.D. Calif. 1970); *United States* v. *Bowen*, 2 SSLR 3421 (N.D. Calif. Dec. 24, 1969); *United States* v. *Sisson*, 297 F. Supp. 902 (D. Mass. 1968).

In all three cases it was held that refusal to recognize selective conscientious objection amounts to invidious discrimination based on the content of religious beliefs. As Judge Weigel put it succinctly in the *Bowen* case, but in terms equally applicable to all three:

> "In denying conscientious objector status to Bowen based upon his religious opposition to the Vietnam War but permitting it to one whose religious opposition is to all wars, the effect of Section 6(j) is to breach the neutrality between religion and religion as required by the mandate of the First Amendment." 2 SSLR at 3422.

Bowen was a Roman Catholic, attended parochial schools for most of his formal education and remained a practicing Catholic. The Court specifically found that the doctrine of "just wars" was a central element of Catholic faith.

> "Without presuming then, to make a conclusive statement about what is orthodox Catholic doctrine, this Court concludes from the ample testimonial and doctrinal evidence introduced at trial that at least a substantial number of knowledgeable Catholic leaders count the doctrine of just wars as a basic element of church dogma, that Bowen reasonably believed Cath-

olic doctrine to require that he make his own determination as to whether the war was or was not just and, that having decided it was unjust, conscientiously believed his religious faith made it imperative that he refuse to serve." 2 SSLR at 3421 n. 1.

The Court also noted:

"While not of direct pertinence, it is to be noted that amicus curaie [sic] briefs were brought to the Court's attention which documented the view that communicants of other faiths—Protestant and Jewish—have ample doctrine in their religions to support similar religious conscientious objection." *Ibid.*

The Court pointed out that:

"An examination of the practical effect of Section 6(j), based on judicial notice, the amicus briefs, and the extensive testimony in this case, leads necessarily to the conclusion that members of traditionally pacifist religions—such as Quakers and Jehovah's Witnesses—are generally exempted from military service while members of other religions—such as Bowen's Roman Catholic faith—are not so exempted." 2 SSLR at 3422.

It was concluded that Section 6(j) violated both the Establishment Clause and the Due Process Clause as a denial of equal protection.

McFadden was also a Catholic and he studied for the priesthood at Pope Pius X Seminary College. Although he decided to forego that calling, he remained a sincere member of the faith. Judge Zirpoli recognized that Catholic dogma perceived a difference between "just" and "unjust wars." He noted the dilemma that this placed on McFadden:

"The first issue is whether Section 6(j) of the Selective Service Act places such a burden upon the religious beliefs of the defendant so as to violate the free exercise clause of the First Amendment. Section 6(j) exempts from military service only those persons whose religious beliefs forbid them to participate in 'war in any form' (in short, any and all wars). The defendant is therefore made to choose between violating his religious beliefs against entering an 'unjust' war, or affirming those beliefs and suffering a possible five-year jail sentence and a possible $10,000 fine. The statute in question puts the most direct burden on the Catholic selective objector—a criminal penalty."

* * * * *

"In the case before the court the statute forces defendant McFadden to choose between following the precepts of his religion and going to jail or abandoning these precepts in order to avoid jail. Indeed, the case of defendant McFadden is stronger than Sherbert's, for not only is he faced with jail, but if he abandons his conscience he will be put in the position of possibly violating the fundamental precept of his religious belief —the killing of another human being in the cause of an unjust war." 309 F. Supp. at 505, 506.

The court concluded that the Free Exercise and Establishment Clauses as well as the Due Process Clause barred prosecution of individuals in McFadden's position.

The *Sisson* case did not involve a member of an established faith. However the court specifically found that Sisson was both sincere and highly ethical.

"Nor was Sisson motivated by purely political considerations. Of course if 'political' means that the area of decision involves a judgment as to the conduct of a state, then any decision as to any war is not without some political aspects. But Sisson's table of ulti-

mate values is moral and ethical. It reflects quite a real, pervasive, durable, and commendable a marshalling of priorities as a formal religion. It is just as much a residue of culture, early training, and beliefs shared by companions and family. What another derives from the discipline of a church, Sisson derives from the discipline of conscience." 297 F. Supp. at 905.

Judge Wyzanski noted that there were impressive competing claims in the situation before him: the public and individual interest in common defense and the public and individual interest in liberty of conscience:

"every man shares and society as a whole shares an interest in the liberty of the conscientious objector, religious or not. The freedom of all depends on the freedom of each. Free men exist only in free societies. Society's own stability and growth, its physical and spiritual prosperity are responsive to the liberties of its citizens, to their deepest insights, to their free choices—'That which opposes, also fits.'

* * * * *

"The sincerely conscientious man, whose principles flow from reflection, education, practice, sensitivity to competing claims, and a search for a meaningful life, always brings impressive credentials. When he honestly believes that he will act wrongly if he kills, his claim obviously has great magnitude. That magnitude is not appreciably lessened if his belief relates not to war in general, but to a particular war or to a particular type of war. Indeed a selective conscientious objector might reflect a more discriminating study of the problem, a more sensitive conscience and a deeper spiritual understanding." 297 F. Supp. at 908.

The court concluded that the rationale of this Court's *Seeger* decision "is quite sufficient for Sisson to lay valid

claim to be constitutionally exempted from combat service in the Vietnam type of situation." 297 F. Supp. at 909.

The court engaged in a balancing test between the government's need for Sisson at that moment and his right to follow his conscience:

> "The chief reason for reaching this conclusion after examining the competing interests is the magnitude of Sisson's interest in not killing in the Vietnam conflict as against the want of magnitude in the country's present need for him to be so employed." 297 F. Supp. at 910.

Furthermore the Establishment Clause was also violated:

> "A Quaker, for example, is covered if he claims belief in the ultimate implications of William Penn's teaching.
>
> Persons trained in and believing in other religious ways may or may not be covered. A Roman Catholic obedient to the teaching of Thomas Aquinas and Pope John XXIII might distinguish between a just war in which he would fight and an unjust war in which he would not fight."
>
> • • • • •
>
> "Earlier this opinion noted that it is practical to accord the same status to non-religious conscientious objectors as to religious objectors. Moreover, it is difficult to imagine any ground for a statutory distinction except religious prejudice. In short, in the draft act Congress unconstitutionally discriminated against atheists, agnostics, and men, like Sisson, who, whether they be religious or not, are motivated in their objection to the draft by profound moral beliefs which constitute the central convictions of their beings." 297 F. Supp. at 911.

Petitioner respectfully urges that the constitutional reasoning and holdings in the three District Court cases reflect a sound emerging doctrine and should be adopted by this Court.

As all of the above cases have noted, no right is absolute; there may always be exceptions to its enforcement. But where a right arises out of the First Amendment, as do the rights asserted by Petitioner here, that right is accorded especially strong protection; it can only be abridged by a showing of the most compelling interest on the part of the government, and a lack of available alternative means for attaining the end sought by the government. *Sherbert* v. *Verner, supra,* 374 U.S., at 406-407. The heavy burden thus placed upon the government is not met in this case; indeed, an examination of the facts demonstrates that, if anything, the most compelling interest of the government lies in granting the claim of Petitioner and others like him.

The commands of the Constitution are clear. If an exemption from military training and service is granted to those whose religious beliefs require that they not participate in all wars, the exemption must equally be given to those whose beliefs compel refusal to participate in the particular war then facing them.

C. *Abridgment of Free Exercise of Religion*

The protection sought for religious liberty and conscience applies no less forcefully to those whose scruples dictate that they abstain from a particular war, than it can to those opposed to all wars. The discriminating religious objector follows a tradition recognized by Christians for more than 1,500 years, when he undertakes to assess whether a con-

flict is a "just war." See, e.g., St. Augustine, *City of God,* Book XIX, ch. 7 (Image Books ed., 1958); St. Thomas Aquinas, *Summa Theologiae,* First Part of the Second Part, Question 105(3); "Deliverance on Rights and Responsibilities of Public Dissent," Social Deliverances of the 178th General Assembly of the United Presbyterian Church U.S.A., *Social Progress,* July-August 1966, 26-30, especially 28; see, also, R. Bainton, *Christian Attitudes Toward War and Peace* (1960) *passim* (tracing the concept of the just war back to the Old Testament, and classical and early Christian thinking which influenced St. Augustine); Finn, *A Conflict of Loyalties* (1968) *passim;* Potter, "Conscientious Objection to Particular Wars," 4 *Religion and the Public Order,* 44, 66-70 (1968); see generally, Hochstadt, *The Right to Exemption from Military Service of a Conscientious Objector to a Particular War,* 3 Harv. Civil Rights-Civil Liberties L. Rev. 1, 10-15 (1967).

Besides the Catholic Church, many Protestant faiths have accepted the proposition that objection to a particular war is morally justifiable. In October, 1969, the Board of Christian Social Concerns of the United Methodist Church issued a statement which said, in part:

> ". . . [W]e ask that all those who conscientiously object to preparation for or participation in *any specific* war or all wars be granted legal recognition and assigned to appropriate civilian service. . . . " (Emphasis supplied.)

In June, 1967 the General Synod of the United Church of Christ passed the following pronouncement:

> "Therefore be it resolved that the General Synod of the United Church of Christ recognize the right of con-

scientious objection to participation in a particular war or in war waged under particular circumstances, as well as the right of conscientious objection to participation in war as such; and

"Be it further resolved that the General Synod remind those who are disposed to take this position that they ought not to do so lightly but only after careful examination and weighing of their own motives, the moral issues at stake including their proper obligations to the nation as an instrument of justice and order, the social as well as personal consequences of their decision, and their readiness to accept military or civilian service of equivalent time, risk and personal inconvenience if afforded them, or else such penalties as may be legally imposed; . . ." Finn, *op. cit.*, ix.

The United Presbyterian Church and the American Baptist Church have adopted similar resolutions. *Ibid.* viii. In July 1968, the World Council of Churches meeting in Uppsala, Sweden voted almost unanimously in favor of the following resolution:

"protection of conscience demands that the churches should give spiritual care and support not only to those serving in armed forces, but also to those who, especially in the light of the nature of modern warfare, object to participation in particular wars they feel bound in conscience to oppose." *The New York Times*, July 17, 1968, p. 1. Col. 3.

The Jewish religion has similar traditions. One scholar after analyzing the general Judaic principles against war has characterized the position as follows:

"It seems evident from the foregoing that Judaism cannot be characterized, in the strict sense of the term, as a 'pacifist' tradition. It seems equally evident that

> Judaism does not regard every war as permissible, nor does it regard every means of prosecuting war as permissible. It is further evident that while Judaism is highly respectful of duly constituted authority, this does not absolve the individual from the duty of making responsible moral decisions. Neither these moral decisions nor their bases are delegated to human authority in any unchallengeable way.
>
> If the above be an accurate rendering of an essential part of the Jewish tradition, it would appear that 'selective' conscientious objection on moral grounds is a fundamental teaching of Judaism and a fundamental demand of its adherents." Gendler, "War and the Jewish Tradition," in Finn, *op. cit.*, 78, 100.

As Judge Wyzanski held in *Sisson,* and as Judge Zirpoli reasoned in *McFadden,* the free exercise clause of the First Amendment, regardless of statute, should protect someone whose religious beliefs command him to refrain from participation in war—all war, or any war.[7] In interpreting the

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[7] See also Macgill, "Selective Conscientious Objection: Divine Will and Legislative Grace," 54 *Virginia Law Rev.* 1355, 1376-77 (1968): "It must be granted that there is a Just War doctrine, that the doctrine is a part of the teachings of admittedly religious denominations, and that the doctrine requires believers to pass judgment on a war before participating in it. It follows that if a member of one of those denominations actually does apply the doctrine to a particular war and finds he cannot participate in it, his claim as a selective objector would have a religious basis. The fact that temporal considerations figured in the decision upon which his claim is based does not negate the religious character of that decision, nor that of the opposition itself as an exercise of his religion. No matter how many political factors he may have weighed, and no matter how personal some of his judgments may have been, his asserted belief and claim do not rest solely on nonreligious considerations. If this is true for a selective objector who belongs to a denomination which recognizes the Just War doctrine, it must be true as well for the selective objector whose religious scruples may be informal, individual, and recognizable only to [the late Professor Paul] Tillich or the Supreme Court."

religious liberty clause, the Supreme Court has occasionally engaged in a balancing process, but it has made it clear that where religious liberty is at stake, the balance weighs heavily against the asserted governmental need. See *Sherbert* v. *Verner, supra; In re Jenison,* 265 Minn. 96, 120 N.W.2d 515 (1963), remanded for consideration in light of *Sherbert,* 375 U.S. 14, 267 Minn. 136, 125 N.W.2d 588 (1963); *United States* v. *McFadden, supra,* 309 F. Supp. at 507.

There have been cases where the government was permitted to abridge the free exercise of certain religions, but such cases are clearly distinguishable from the present one, and can have little application here except by way of contrast. First, it should be noted, these cases dealt with statutes or regulations which sought to restrain the persons involved from taking certain actions. As the court stated in *McFadden, supra,* these restrictions "dealt with the protection of society's health and morals from affirmative acts required by the religion." 309 F. Supp., at 505. See, e.g., *Reynolds* v. *United States,* 98 U.S. 145 (1878), dealing with the early Mormon practice of polygamy; and *Prince* v. *Commonwealth of Massachusetts,* 321 U.S. 158 (1944) dealing with a Jehovah's Witness who compelled a child to sell religious magazines in violation of the state's child labor laws. The latter case, especially, points up the distinction to be made here, for while the restraint on the affirmative acts of the Witnesses was upheld in *Prince,* the courts were simultaneously preventing the government from forcing members of the same sect to serve in the armed forces contrary to their beliefs. Many years ago, Chief Justice Stone, before his elevation to the Supreme Court, described the distinction thus:

> "[C]ompelling the citizen to refrain from doing an act which he regards as moral and conscientious does not do violence to his conscience; but his conscience is violated if he is coerced into doing an act which is opposed to his deepest convictions of right and wrong." Stone, "The Conscientious Objector," 21 Columbia Univ. Quart. 253, 268 (1919).

A second distinction between such cases as *Reynolds, supra,* and *Prince, supra,* and the present one is that in the former cases, there was no element of establishment of religion; the members of no other religious faith or sect had been granted the right to do what the parties there sought. But in the present case, many persons are by the statute permitted to have their beliefs recognized and respected, and are granted exemption from military service; it is only those whose beliefs are similar to Petitioner's who are denied the exemption. This, as we have already seen, must constitute not only an abridgement of the free exercise of the Petitioner's religion, but also an establishment of religion; it is therefore impermissible under *Epperson, supra, Everson, supra,* and like cases.

The final consideration in determining whether Petitioner's claim of religious liberty should be recognized is the magnitude of his claim. He is not asking to be relieved of a Sunday closing law; or a tax which he finds religiously offensive; or a requirement that he report for work on his Holy Day or suffer loss of unemployment compensation; or compulsory jury duty; or even a child labor law which interferes with the religious education of his children. He is saying that participation in the Vietnam War in any form is so obnoxious to his innermost religious beliefs that he is compelled to reject any participation in it. He is saying

that his religious beliefs would give him "no rest or peace," *Welsh* v. *United States*, 398 U.S. at 344 if he allowed himself to remain part of an instrument of this war. There is a profound difference between any other command which the state imposes on its citizenry, and the command that the citizen kill other human beings.[8] There can be no more noble expression of the amplitude of the religious liberty guaranty than to respect the religious belief of the citizen who cannot kill.

III.

The right to conscientious objector status must be considered of constitutional dimension and must be given the broadest possible protection by this Court.

Justice Harlan noted in his concurring opinion in *Welsh* that "Congress, of course, could entirely consistent with the requirements of the Constitution, eliminate *all* exemptions for conscientious objectors."[9] 390 U.S. at 356. However, there is both historical evidence and Constitutional development contrary to this position. And if the right is

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[8] See Redlich and Feinberg, "Individual Conscience and the Selective Conscientious Objector: The Right Not to Kill." 44 *N.Y.U. Law Rev.* 875 (1969). When the government "orders citizens to kill or die, it comes close to the limits that even Hobbes put down around the authority of the Leviathan." Christian Bay, quoted in Kaufman, "The Selective Service System: Actualities and Alternatives" in Finn (ed.), *A Conflict of Loyalties*, 240, 252 (1968).

[9] But see *contra*, *United States* v. *Sisson*, *supra*, 297 F. Supp. at 907-908; Thomas Reed Powell, "Conscience and the Constitution," in W. Hutchinson, ed., *Democracy and National Unity*, 18 (1941): "Notwithstanding all judicial declarations, it has not been actually decided that a conscientious objector, not within any group exempted by Congress, can be put into the front-line trenches or put into the army where certain refusals to obey orders may be punished by death."

found to be of Constitutional dimension, it must be as broadly interpreted as all other vital rights of the people.

A. *Historical Evidence.*

The history of the conscientious objector experience in America shows that it has always been considered of great constitutional importance. Legal protection of conscientious objectors was afforded as early as 1673 in Rhode Island (Selective Service System, Special Monograph No. 1, 2 *Backgrounds of Selective Service*, pt. 12, at 13 (1947), Rhode Island Act of August 13, 1963). The law not only exempted all those who had conscientious scruples against bearing arms but also imposed no militia fine or alternate service. (See Brock, *Pacifism in the United States*, 41 (1968)). Later laws in that colony required objectors to perform other duties such as fire-fighting, removing women and children from places of peril or "any other duty consistent with Religious Principles." (*Backgrounds*, pt. 12 at 56, 59.)

Other colonies followed suit. New York passed a law in 1755 exempting Quakers from militia duty on payment of a commutation fee or the furnishing of a substitute (*Backgrounds* pt. 9 at 186). Massachusetts in 1757 permitted Quakers to pay a militia fine in lieu of service (*Backgrounds*, pt. 6 at 195) and a Virginia law of 1766 allowed those with religious scruples to provide a substitute (*Backgrounds*, pt. 14 at 249). North Carolina also excused Quakers from mustering with the militia (*Backgrounds*, pt. 10 at 46).

Pennsylvania (which was under the political control of the Quakers during most of the colonial period) relied on

a voluntary militia until 1757, but the law passed in that year had generous provisions for objectors:

> "All Quakers, Mennonists, Moravians, and other conscientiously scrupulous of bearing arms, who shall appear on any alarm with the militia, though without arms, and obey the commands of the officers in extinguishing fires, suppressing insurrection of Slaves or other evil-minded persons during an attack, in caring for wounded, conveying intelligence as expresses or messengers, carrying refreshments to such as are on duty, and in conveying to places of safety women and children, aged, infirm, and wounded persons, are free and exempt from the penalties of the act." Selective Service System, Special Monograph No. 11, 1 *Conscientious Objection,* 30 (1951).

By the eve of the Revolutionary War most of the colonies had generous provisions exempting those religiously scrupulous from bearing arms. Even after the war broke out, this policy was not altered. On June 30, 1775 the Pennsylvania Assembly urged the citizens of the state to recognize the validity of the objector's claims of conscience:

> "The House taking into consideration that many of the good people of this Province are conscientiously scrupulous of bearing of arms, do hereby earnestly recommend to the Associators for the Defense of their Country, and others, that they bear a tender and brotherly regard toward this class of their fellow-subjects and Countrymen; and to these conscientious people it is also recommended, that they cheerfully assist, in proportion to their abilities, such associators as cannot spend their time and substance in the public service without great injury to themselves and families." 1 *Conscientious Objection,* at 33.

The Continental Congress was also quick to assure conscientious objectors that their beliefs would be respected. On July 18, 1775 it passed the following resolution:

> "As there are some people who from Religious Principles cannot bear Arms in any case, this Congress intend no Violence to their Consciencies, but earnestly recommend it to them to Contribute Liberally, in this time of universal calamity, to the relief of their distressed Brethren in the several Colonies, and to do all other services to their oppressed country, which they can consistently with their Religious Principles." *Ibid.*, 33-34.

At the same time, many states were going even further to protect the rights of objectors. Aside from the specific statutory protection which was present in almost all the colonies, no less than six states included conscientious objector provisions in the constitutions passed during the Revolutionary period as part of the basic rights of their citizens.[10] Pennsylvania led the way in 1776. Article VIII of the Declaration of Rights to the Pennsylvania Constitution specified:

> "VIII. That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and to yield his personal service when necessary, or an equivalent thereto: But no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives:

[10] While the conscientious objectors of the Revolutionary War came almost exclusively from the established peace churches, there were a number of isolated instances of war resistance among individuals who belonged to no established denomination. See Brock, *op. cit.* pp. 278-84.

> Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent, nor are the people bound by any laws but such as they have in like manner assented to, for their common good." Francis N. Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws*, vol. V, p. 3081 (1909).

Delaware included an almost identical provision in Section 10 of its 1776 Declaration of Rights (see Laws of the State of Delaware, 1700-1797, vol. I, Appendix, p. 79 (1797)). Vermont did the same in its 1777 Constitution (Section 9) (Thorpe, *op. cit.*, vol. VI, p. 3737), and New Hampshire, in its Bill of Rights of 1783 (Article XII and XIII) (See Thorpe, *op. cit.*, vol. IV, p. 2453). See also Article X of the Massachusetts Declaration of Rights (1780) (*Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay, 1779-1780*, p. 222 (1832)).

New York included a more detailed provision specifically to protect the Quakers. Article XL of the 1777 New York Constitution specified:

> "That all such of the inhabitants of this State being of the people called Quakers as, from scruples of conscience, may be averse to the bearing of arms, be therefrom excused by the legislature; and do pay to the State such sums of money, in lieu of their personal service, as the same may, in the judgment of the legislature, be worth." Thorpe, *op. cit.*, vol. V, p. 2623.

After the war, the protection to be afforded conscientious objectors was still of great concern to the statesmen of the time. One of the objections raised to the proposed federal

Constitution in 1787 was that no protection was afforded those religiously scrupulous of bearing arms. North Carolina on August 1, 1788 passed a Declaration of Rights Resolution which proposed that certain amendments be made to the Federal Constitution. Among these amendments was No. 19: "That any persons religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead." 4 Elliott's *Debates* 243, 244 (2d ed. 1836). Virginia adopted a resolution with the same proposal. 3 Elliott's *Debates* 657-659. Rhode Island at the time of ratification of the United States Constitution, June 16, 1790, declared that certain amendments be accepted. Among these was No. 18 which contained the exact language of the earlier North Carolina amendment No. 19. 1 Elliott's *Debates* 334, 335. In the debates by the Pennsylvania Legislature on adoption of the Federal Constitution an objection was voiced that Congressional power was too broad and that ". . . they may coerce men to act in the militia, whose consciences are against bearing arms in any case." 2 Elliott's, *Debates*. 531.

Minority members of the Pennsylvania convention urged in the strongest terms that protection for conscientious objectors be written into the federal Constitution.

> "Secondly, the rights of conscience may be violated, as there is no exemption of those persons who are conscientiously scrupulous of bearing arms. These compose a respectable proportion of the community in the state. . . .
>
> [During the Revolution] the framers of our State Constitution made the most express and decided declaration and stipulations in favor of the rights of

> conscience; but now, when no necessity exists, those dearest rights of men are left insecure." J. McMaster & F. Stone, *Pennsylvania and the Federal Constitution, 1787-1788*, 480-81 (1888).

Since the Constitution had been ratified only on the implied promise that a federal bill of rights would be promptly appended to it, James Madison moved quickly in Congress to introduce a series of proposed amendments to protect individual rights. One of his proposals, which became the Second Amendment, specifically excused conscientious objectors from militia service:

> "The right of the people to keep and bear arms shall not be infringed; a well armed and well-regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person." 1 *Annals of Congress*, 1st Cong., 433.

The proposed Bill of Rights was referred to a Select Committee of Eleven which suggested even more generous protection for objectors, not even suggesting the furnishing of a substitute or any equivalent service:

> "A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms." 1 *Annals*, 749.

Debate on the provision took place on August 17, 1789. There were various objections raised to the proposal. Some representatives wished to insure that some equivalent service or payment be required. Thus Representative James Jackson of Georgia stated:

> "Mr. Jackson did not expect that all of the people of the United States would turn Quakers or Moravians; consequently one part would have to defend the other in case of invasion. Now, this, in his opinion, was unjust, unless the Constitution secured an equivalent; for this reason, he moved to amend the clause, by inserting at the end of it, 'upon paying an equivalent, to be established by law.'" *Ibid.* at 750.

But objection was raised to this amendment: Roger Sherman of Connecticut noted: "It is well known that those who are religiously scrupulous of bearing arms, are equally scrupulous of getting substitutes or paying an equivalent. Many of them would rather die than do either one or the other; . . ." *Ibid.* John Vining of Delaware agreed:

> "Mr. Vining hoped the clause would be suffered to remain as it stood, because he saw no use in it if it was amended so as to compel a man to find a substitute, which, with respect to the Government, was the same as if the person himself turned out to fight." *Ibid.* 751.

A more serious question was raised by Roger Sherman. He pointed out that the states would have the primary responsibility for organizing the militia and presumably would grant generous exemptions as they had in the past. "The States, respectively, will have the government of the militia, unless when called into actual service; . . ." *Ibid.* 750. This argument was picked up by Egbert Benson of New York who suggested that the entire conscientious objection clause be eliminated for that reason. "He would always leave it to the benevolence of the [State] Legislature, for, modify it as you please, it will be impossible to express it in such a manner as to clear it from ambiguity. . . . I have no reason to believe but the [State] Legislature

will always possess humanity enough to indulge this class of citizens in a matter they are so desirous of; but they ought to be left to their discretion." The proposal to exclude the clause was defeated, 24 to 22. *Ibid.* 751.

However, three days later the debate resumed. Again it was proposed that an equivalent be demanded. 1 *Annals* 766. Elias Boudinot of New Jersey insisted on broad protection, however:

> "Mr. Boudinot thought the provision in the clause, or something similar to it, was necessary. Can any dependence, said he, be placed in men who are conscientious in this respect? or what justice can there be in compelling them to bear arms, when, according to their religious principles, they would rather die than use them? He adverted to several instances of oppression on this point, that occurred during the war. In forming a militia, an effectual defence ought to be calculated, and no characters of this religious description ought to be compelled to take up arms. I hope that in establishing this Government, we may show the world that proper care is taken that the Government may not interfere with the religious sentiments of any person. Now, by striking out the clause, people may be led to believe that there is an intention in the General Government to compel all its citizens to bear arms" (*Ibid.* at 767).

Eventually, the Senate eliminated the conscientious objector clause. (See E. Dumbauld, *The Bill of Rights and What It Means Today,* 46 n. 9 (1958).) However, the House debates during 1789, just discussed, and later in 1790 (when the Uniform Militia Bill was under consideration) indicate that the deletion was made to protect rather than restrict the rights of conscientious objectors.

It seems clear the framers thought that the federal national army would be made up only of volunteers so the problem of conscientious objection would not arise in that area.[11] Thus, the only way in which a citizen could be compelled to render military service was through the state militia. But the states already had generous provisions on relieving conscientious objectors from compulsory service. Since there was strong sentiment in Congress for demanding some equivalent payment in lieu of service, any nationwide rule would hurt the conscientious objectors living in those states which exempted them from all military duty and any militia fine.

This approach is clearly shown in the debates on the Uniform Militia Bill in December 1790. Secretary of War Henry Knox introduced a plan for the federal government to organize all the citizens of the militia, excluding "exempts of religious sects." The latter would, however, have to pay an equivalent fine. Aedenus Burke of South Carolina objected to the tax:

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[11] See Friedman, "Conscription and the Constitution: The Original Understanding," 67 *Mich. Law Rev.* 1493 (1969). The historical evidence supporting the view that no power to conscript was given the federal government include explicit remarks by Edmund Randolph when he introduced the plan that became the Constitution: "What reason to expect that the treasury will be better filled in the future, or that money can be obtained under the present powers of Congress to support a war. Volunteers not to be depended on for such a purpose. Militia difficult to be collected and almost impossible to be kept in the field. Draughts stretch the strings of government too violently to be adopted. Nothing short of a regular military force will answer the end of war, and this only to be created and supported by money." *Ibid.* at 1513 quoting 1 Farrand, *Records of the Federal Convention* 25 (1911); see also *The Federalist Papers* 8, 24, 25, 41; (*Ibid.* 1520 ff.); numerous comments at the State Ratifying Conventions (*Ibid.* 1525 ff.) and many steps taken by the First Congress (*Ibid.* 1535 ff.).

> It was contrary to the Constitution . . . to lay a tax upon certain classes of citizens; not being consonant with the principles of justice to make those conscientiously scrupulous of bearing arms pay for not acting against the voice of their conscience. This, he said, was called the land of liberty, in it, we boasted, that no one suffered on account of his conscientious scruples, and yet we are going to make a respectable class of citizens pay for a right to a free exercise of their religious principles; it was contrary to the Constitution; it was contrary to that sound policy which ought to direct the House in establishing the militia. 2 *Annals of Congress,* 1 Cong., 2nd Sess., 1818.

James Jackson objected to total exemption:

> [I] certainly should oppose the principle started by the gentlemen last up. Who are to know . . . what persons were really conscientiously scrupulous? There is no tribunal erected to make them swear to their scruples. If the principle were adopted, . . . very few would be found, if their own word was to be taken, not conscientiously scrupulous. There were other sects . . . besides the Quakers averse to bearing arms. If the principle be adopted of requiring no compensation from the exempted, it will lay the axe to the root of the militia . . . the bill might as well be postponed altogether. *Ibid.*

John Vining spoke highly of the Quakers' principles but recognized that same equivalent should probably be demanded of them.

> "With respect to the Quakers, he replied to some observations of Mr. Jackson, who had asked what will become of our boasted independence in case of the exemption of the Quakers? He asked, were there no Quakers in the late war? He adverted to the conduct

of the first settlers of Pennsylvania, who were Quakers; their peaceful principles were productive of the happiest consequences; and in this view their conduct had been an example, which, in proportion as mankind shall recede from the force of turbulent passions, will be more and more imitated. He, however, supposed that an equivalent might be assessed on these people without difficulty, and which, from their numbers, supposed to be one-twentieth part of the people, would amount to a sum sufficient to support a militia; at least, to furnish them with arms, drums, colors &c." *Ibid.* at 1823.

James Madison also came around to this point of view:

"Mr. Madison moved to insert among the exemptions, persons conscientiously scrupulous of bearing arms. It is the glory of our country, said he, that a more sacred regard to the rights of mankind is preserved than has heretofore been known. The Quakers merit some attention on this delicate point, liberty of conscience. When they had it in their power to establish their religion by law they did not. He was disposed to make the exemption gratuitious, but supposed it impracticable. He replied to Mr. Jackson's observations, that exempting such persons would induce the people generally to turn Quakers. He did not believe that the citizens of the United States would hypocritically renounce their principles, their conscience, and their God, for the sake of enjoying the exemption." *Ibid.* at 1824.

Roger Sherman continued to press for complete exemption and James Jackson insisted any recognition of conscientious objection would "destroy the whole militia bill" (*Ibid.*, 1825). Finally Benjamin Bourn of Rhode Island pointed out how a uniform rule of the type proposed would hurt the Quakers rather than help them.

"Mr. Bourne [sic] observed, that if the General Govern ment should take up the matter, and subject th Quakers to a penalty as an equivalent for persona service, their situation would be rendered less eligibl than it is at present; for, in several of the States, the are not only exempted from militia duty, but from al fines and penalties in lieu thereof. He instanced th States of New Hampshire, Massachusetts, Rhod Island, and Connecticut." *Ibid.* at 1827.

Eventually this view prevailed and no mention was made of conscientious objectors in the 1792 Militia Act. (Act of May 8, 1792, ch. 33, 1 Stat. 271.)

The only fair reading of the debates in 1789 and 1790 was that conscientious objection was viewed by the framers as a vital constitutional right of those with religious scruples about bearing arms. The fact that six states included provisions in their Constitutions to protect such rights and that four states recommended similar provisions in the federal Bill of Rights shows the importance attributed to that dictate of conscience. It was only because the states already protected that right and no need seemed to exist for blanket federal protection that no specific clause was inserted in the federal Bill of Rights. Had Madison and the statesmen of that time known that the Supreme Court would decide in the *Selective Draft Law Cases,* 245 U.S. 366 (1918) that the federal government could draft citizens directly into a federal army, they most certainly would have retained some guaranty for those conscientiously scrupulous of bearing arms.

B. *Constitutional Interpretation.*

The idea that Congress could do away with conscientious objection altogether had its roots in dicta found in *United States* v. *Macintosh,* 283 U.S. 605, 624 (1931):

> "The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution but from acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; and if it be withheld, the native-born conscientious objector cannot successfully assert the privilege." [12]

The point was repeated by the Court (and by Justice Cardozo in his concurring opinion) in *Hamilton* v. *Regents,* 293 U.S. 245, 264, 266-67 (1934). Although Congress, many courts, and most commentators have continued to hold to this position,[13] the proposition is in serious question following this Court's recent decisions interpreting the Free Exercise and Establishment Clauses in the First Amendment.

In the first place, *Macintosh* was itself explicitly overruled in *Girouard* v. *United States,* 328 U.S. 61 (1946). The idea that the state with impunity may force a citizen to do acts which violate his conscience has been firmly rejected by

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[12] But the very next sentence in the Court's opinion indicates there may be some limits on that power: "No other conclusion is compatible with the well-nigh limitless extent of the war powers as above illustrated, which include, by necessary implication, the power, *in the last extremity,* to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general." (Emphasis supplied.) See note 9, *supra.*

[13] See Note, "The Conscientious Objector and the First Amendment: There but for the Grace of God. . . ." 34 *Univ. of Chic. Law Rev.* 79, 80 (1966).

this Court. See *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943). *Abington School District* v. *Schempp*, 374 U.S. 222 (1963). As Chief Justice Hughes wrote in dissent in *Macintosh* expressing a view which eventually prevailed in *Girouard*,

> "... in the forum of conscience, duty to a moral power higher than the State has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation. ...
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> "One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God. ...
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> "... putting aside dogmas with their particular conceptions of deity, freedom of conscience itself implies respect for an innate conviction of paramount duty. The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field." 283 U.S. at 633, 634.[14]

[14] It should also be noted that Professor Macintosh was a "selective" objector to war, stating that he would fight only in a war that was morally justified. Chief Justice Hughes commented: "Nor is there ground, in my opinion, for the exclusion of Professor Macintosh because his conscientious scruples have particular reference to wars believed to be unjust. There is nothing new in such an attitude. Among the most eminent statesmen here and abroad have been those who condemned the action of their country in entering into wars they thought to be unjustified. Agreements for the renunciation of war presuppose a preponderant public sentiment against wars of aggression. If, while recognizing the power of Congress, the mere holding of religious or conscientious scruples

Secondly, the *Schempp*, *Sherbert*, and *Torasco* cases *supra* make clear that strict neutrality in matters of religion must be maintained by the government in all relations with different groups of citizens. It may neither prefer one over the other or encourage all against non-believers. Nor can it impose any unnecessary burden on believers unless an overriding necessity were shown. If Congress were to repeal Section 6(j) and deny conscientious objector status to everyone, including the most devout Quakers or Mennonites, they could justly complain that the neutrality of the state with respect to religion was being breached. Such a step, going to the heart of the religious beliefs of many recognized sects, would be contrary to the explicit intent of the framers of the Constitution, contrary to the spirit of the First Amendment, and contrary to the religious nature of the people. If the mere forfeiture of benefits in the *Sherbert* case imposed a burden on the free exercise of religion, *a fortiori* governmental compulsion under penalty of the criminal law to make all able-bodied members of the historic peace churches serve in the army in violation of the central tenet of their religions could not pass Constitutional muster.

Since the government is compelled under the First Amendment to respect religious liberty and accommodate state power to the Free Exercise Clause, it must grant the exemption. This Court said in *Zorach* v. *Clauson*, 343 U.S. 306, 313-14 (1952):

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against all wars should not disqualify a citizen from holding office in this country, or an applicant otherwise qualified from being admitted to citizenship, there would seem to be no reason why a reservation of religious or conscientious objection to participation in wars believed to be unjust should constitute such a disqualification." 283 U.S. at 635.

> "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. *For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.*" (Emphasis added.)

Applying this approach, recognition of conscientious objection rises to a Constitutional right:

> "Were the Court to adopt the accommodation theory in passing on the constitutional claim of the conscientious objector, it is certain that the claim would be upheld, as the force of the establishment clause limitation would be minimized. Under the doctrine of *Zorach* and the logic of *Sherbert*, the government would be required to accommodate the needs of national defense to the religious needs of its people, and provide an exemption for the conscientious objector. This result is strengthened by the facts shown earlier which indicate that granting the exemption has a negligible effect on the maintenance of national defense." Note "The Conscientious Objector and the First Amendment: There but for the Grace of God . . .," 34 *Univ. of Chic. Law Rev.*, 79, 91 (1966).

Once it is shown that the Free Exercise Clause of the First Amendment protects at the very least the traditional conscientious objector claims made by the Quakers and other peace sects, the Establishment and Due Process Clauses require all other citizens similarly inspired to be similarly treated. (See Point II above.)

There is no difficulty in defining the proper scope of the constitutional right to recognition of conscientious objection. A wealth of history exists as to how the exemption

had been treated throughout our nation's existence. As shown below in point IV there will be no serious burden placed upon the government in recognizing the exemption as a constitutional right. As Chief Justice Stone said in his famous article on conscientious objection:

> "The ultimate test of the course of action which the state should adopt will of course be the test of its own self-preservation; but with this limitation, at least in those countries where the political theory obtains that the ultimate end of the state is the highest good of its citizens, both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process." "The Conscientious Objector," 21 *Columbia Univ. Quart.* 253, 269 (1919).

IV.

No other competing Government interest can justify denial of conscientious objector status to individuals in Petitioner's position.

A. *Administrative Convenience.*

Various reasons have been offered to justify the denial of claims of so-called selective conscientious objectors. Among them are the anticipated proliferation of claims, and the difficulty of detecting false claims. Neither of these reasons, however, is even remotely sufficient. Both are essentially arguments of administrative convenience of the sort which the Supreme Court has many times held to be insufficient grounds for the abridgement of rights protected by the First Amendment. Cf. *NAACP* v. *Button,* 371 U.S. 415 (1962); *Thomas* v. *Collins,* 323 U.S. 516 (1945); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); *Schneider* v. *State,* 308 U.S. 147 (1939); *Lovell* v. *Griffin,* 303 U.S. 444 (1938).

As to multiplicity of claims, the same allegation was raised at the time of the *Seeger* decision, *supra,* but the problem has not arisen. In its latest available figures (of June 30, 1970) the Selective Service System lists 40,303,654 registrants and only 19,714 1-O's; 9,189, 1-W's (individuals then engaged in work of national importance) and 11,743 1-W's released. These total 40,646 or only one-tenth of one per cent of the total registrants.

The alleged problem of false claims was raised in *Sisson, supra,* but as Chief Judge Wyzanski noted:

> "The suggestion that courts cannot tell a sincere from an insincere conscientious objector underesti-

mates what the judicial process performs every day. Ever since, in *Edginton* v. *Fitzmaurice* (1882), L.R. 29 Ch. Div. 359, Bowen, L. J. quipped that 'the state of a man's mind is as much a fact as the state of his digestion,' each day courts have applied laws, criminal and civil, which make sincerity the test of liability." 297 F. Supp., at 909-910.

Cf. *United States* v. *McFadden, supra,* 309 F. Supp., at 508. And even if it should arise, the Supreme Court has most explicitly rejected such an argument in other areas.

"For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that *no alternative forms of regulation* would combat such abuses without infringing First Amendment rights." *Sherbert* v. *Verner, supra,* 374 U.S., at 407 (emphasis added).

The experience of Great Britain during World War II shows that the administrative problems for particular objectors were hardly noticeable. Under Section 5 of the National Service (Armed Forces) Act of 1939 (2 & 3 Geo. 6 c. 81) any person who claimed that:

". . . he conscientiously objects

(a) To being registered in the military service register, or

(b) To performing military service, or

(c) To performing combatant duties . . . may . . . apply in the prescribed manner to be registered as a conscientious objector.

The law neither required a religious test nor raised any question about objecting to all war rather than a particular

war. Mr. Fenner Brockway (now Lord Brockway) explained:

> "The test was not the ground of objection but the depth of the objection. If an applicant convinced them that he held his convictions so rootedly that they represented to him an issue of right or wrong in his own conduct they exempted him, despite the fact that in another war he might take up arms." Preface to Hayes, *Challenge to Conscience* (1949).

The number of men applying for C.O. status remained extremely low. In October 1939, 222 out of every 10,000 registered claimed conscientious objection; by 1942, the number fell to 36 per 10,000 and remained low for the rest of the war. Over 60,000 claims were made, 43,000 of which were granted, or about 0.5% of a total registration of 8,123,000. (See Sibley and Jacob, *Conscription of Conscience: 1940-1947*, 5 (1952); Cornell, *The Conscientious Objector and the Law*, 119-138 (1943). MacGill, "Selective Conscientious Objection: Divine Will and Legislative Grace," 54 *Virginia Law Rev.* 1355, 1381, n. 101; Note, 34 *Univ. of Chic. Law Rev.* 79, 89, 103-04 (1966).)

These reports also indicate that the way of the conscientious and particularly the selective conscientious objector, is hard indeed. See Sibley and Jacob, *op. cit.* 315-19, 459-64. Understandably, few seek conscientious objector status especially in a nation which does not cheerfully tolerate active dissent in times of international crisis. "This is borne out by the experience of the American Civil Liberties Union that notwithstanding its stated readiness to accept selective conscientious objector cases for almost three years, only a handful of men have come forward." Book Review, New York Times, Nov. 2, 1969, pp. 10, 12.

B. *Maintenance of Morale and Efficiency in the Armed Services.*

One of the purposes of Congress in granting exemptions to conscientious objectors was also presented forcefully in the 1940 hearings of the House Military Affairs Committee. Thus, it was said by Congressman Faddis:

> "And, secondly, I am sure if I were to go out and command the troops—and I may—I don't want any conscientious objectors in my regiment at all. I would rather they would be some place else. They would be more bother than they would be worth, and a bad example to other men. You could not do anything with them in the way of soldiers and somebody would have to be doing the fighting in a war and I am sure no man who would command the troops would want them." National Service Board of Religious Objectors, *Congress Looks at the Conscientious Objector* 12 (1943).

In support of the above is the statement in Brahms, *They Step to a Different Drummer,* 47 Mil. L. Rev. 1, 18 (1970):

> "The writer's personal experience with in-service objectors and the clear behavior pattern manifested in the reported cases indicate that when the services force a sincere objector to continue in an active duty status, the usual, and perhaps expected, result is a recalcitrant soldier prone to disciplinary trouble. When the in-service objector is forced to choose between adhering to military law and being true to his beliefs, the latter alternative usually prevails. He, as a matter of course, commits violations of orders (albeit, usually from a sublime motive, but violations nevertheless). His presence is often disruptive of unit discipline. His productivity and usefulness as a member of the armed forces is significantly reduced

by virtue of his lack of motivation. Most, if not all, potential tasks which may be assigned violate his religious precepts, with the result that the objector will refuse to perform them. Therefore, it appears that according all sincere objectors freedom from continued personal military service might actually have a positive effect on military efficiency, morale and discipline." (Footnote omitted.)

If anything, these statements indicate that considerations of armed forces' morale should support a broad definition of conscientious objection to include objectors to the particular war then facing the registrants. To avoid disruption and adverse effects on morale, the military should avoid at all costs the induction of strong-willed and discriminating objectors to that war.

Chief Justice Stone noted, in his article on conscientious objection, during World War I:

"The presence of considerable numbers of these men in camps was a menace to the morale and discipline of the loyal enlisted men. They required the time and attention of competent officers whose services were needed in promoting our military operations. Any plan of action which would free the Army from the incubus of the conscientious objector, without as a consequence increasing his numbers, was of immense practical advantage to the military administration and was recognized as such by many of the most capable officers in the Army. Such unemotional military disciplinarians as the Romans found that discretion was the better part of valor in dealing with the religious scruples of the Jews; and such a rigid militarist as Napoleon found it convenient to assign the Mennonite conscripts to noncombatant service." Stone, *op. cit.* 270.

The same considerations mentioned by Chief Justice Stone apply when a selective conscientious objector is drafted into the army against his conscience.

C. *Disrespect for Law.*

In its report, *In Pursuit of Equity: Who Serves When Not All Serve,* the National Advisory Commission on Selective Service headed by Burke Marshall offered various reasons why the theory of selective conscientious objection should be rejected. It wrote (at p. 50):

> "First of all, the majority believes that the status of conscientious objection can properly be applied only to those who are opposed to all killing of human beings under any circumstances. It is one thing to deal in law with a person who believes he is responding to a moral imperative outside of himself when he opposes all killing. It is another to accord a special status to a person who believes there is a moral imperative which tells him he can kill under some circumstances and not kill under others. Moreover, the question of 'classical Christian doctrine' on the subject of just and unjust wars is one which would be interpreted in different ways by different Christian denominations and therefore not a matter upon which the Commission could pass judgment.
>
> Secondly, the majority holds that so-called selective pacifism is essentially a political question of support or nonsupport of a war and cannot be judged in terms of special moral imperatives. Political opposition to a particular war should be expressed through recognized democratic processes and should claim no special right of exemption from democratic decisions.
>
> Third, in the majority view, legal recognition of selective pacifism could open the doors to a general theory of selective disobedience to law, which could quickly tear down the fabric of government; the distinction

is dim between a person conscientiously opposed to participation in a particular war and one conscientiously opposed to payment of a particular tax.

Fourth, the majority of the Commission was unable to see the morality of a proposition which would permit the selective pacifist to avoid combat service by performing noncombatant service in support of a war which he had theoretically concluded to be unjust.

Finally, the majority felt that a legal recognition of selective pacifism could be disruptive to the morale and effectiveness of the Armed Forces. A determination of the justness or unjustness of any war could only be made within the context of that war itself. Forcing upon the individual the necessity of making that distinction—which would be the practical effect of taking away the Government's obligation of making it for him—could put a burden heretofore unknown on the man in uniform and even on the brink of combat, with results that could well be disastrous to him, to his unit and to the entire military tradition. No such problem arises for the conscientious objector, even in uniform, who bases his moral stand on killing in all forms, simply because he is never trained for nor assigned to combat duty." [15]

[15] The overwhelming majority of distinguished writers, scholars and theologians who have considered the subject have strongly endorsed the wisdom of and advocated recognition of selective conscientious objection, and have vigorously criticized the reasoning and conclusions of the Marshall Commission majority. This is true of most of the contributors to the most recent book which has been published on this subject, Finn (ed.), *A Conflict of Loyalties* (1968). See particularly the essays by the late Father John Courtney Murray, one of the Marshall Commission minority; see, also, Quade, "Selective Conscientious Objection and Political Obligation," Finn, *supra*, at 195, 205-211; Harrington, "Politics, Morality and Selective Dissent," Finn, *supra*, at 219, 224-226; and Kaufman, "The Selective Service System: Actualities and Alternatives," Finn, *supra*, at 240, 244-254.

The previous section has referred to the last reason given. Furthermore it is difficult to see why only soldiers in combat can make a decision whether a war is just or not. There is no reason to think that civilians exposed to the multiplicity of news outlets reporting on every phase of any conflict cannot inform themselves and evaluate the ethical considerations leading to a conscientious objection to the war they are being drafted into. In addition, the whole point of a broader exemption rule is to insure that conscientious objectors of any kind are never put in the position that they could endanger their military unit.[16]

The fourth point noted above relates only to the specific proposal made by the minority on the commission and is not relevant here.

The other points will be dealt with in order:

(1) All killing under any circumstances.

The idea that conscientious objection requires an aversion to all killing at all times has never been the law. Courts have constantly recognized the validity of conscientious objector claims made by Jehovah's Witnesses who would fight in a war commanded by God, by pacifists who would engage in self-defense and by others who would defend their country if attacked. See discussion at pp. 24 ff. above. Furthermore to say that a man cannot obey a moral imperative to kill only under certain cir-

[16] It must also be noted that the Department of Defense has established a careful procedure for processing in-service claims of conscientious objection. See DOD Directive 1300.6. This program shows the military's own awareness of the problem of retaining conscientious objectors within its ranks.

cumstances is to deny one of the vital traditions of western religious thought, the "Just War" doctrine. It is certainly as sinful for a Just War Catholic to fight in an immoral war, as it is for a Quaker to bear arms. It is impossible to distinguish between the inner compulsions of the one and the other. For the Commission to discard the Just War doctrine as a "subject which would be interpreted in different ways by different Christian denominations" is to avoid the crucial question altogether. "It does not necessarily follow that because an admittedly religious doctrine is not uniform among sects it is therefore not religious." Macgill, *op. cit.*, 1374, n. 82.

(2) Political question.

This court's decision in *Welsh* makes clear that the second objection raised by the Marshall Commission is without foundation.

> "We certainly do not think that [Section] 6(j)'s exclusion of those persons with 'essentially political, sociological, or philosophical views or a merely personal moral code' should be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy." 398 U.S. at 342.

So long as the political considerations are not the sole basis of the exemption, so long as the other tests of *Seeger* and *Welsh* are met, there is no problem about objection being only a political question. See Point IC above.

(3) Disrespect for law.

The conscientious objector exemption has a long tradition in America and constitutes a very specific relief from the operation of law. (As noted above, most of the early colonies required some form of alternate service or payment.) There has never been any similar tradition of exemption from taxes or other duties of citizenship. Thus there is no difficulty in "rounding out" the definition of conscientious objection to meet the moral requirements of another time and treating all such objectors in the same way.

In addition, this country has always recognized the difference between laws which do evil to oneself and those which require one to do evil to others. Lyman Beecher, the father of Harriet Beecher Stowe and the greatest theologian of his time, wrote one hundred years ago about the Fugitive Slave Law:

> "I may disapprove a law, I may think it unwise, injudicious, . . . and yet it may not require me to do anything positively wrong. I may submit to such a law, innocently, because I wrong nobody. But here is a law which commands me to sin positively and without apology. It commands me, when fully obeyed, to deny Christ, to renounce and abjure Christ's law, to trample under foot Christ's Spirit, and to remand Christ's flesh and blood into cruel bondage. . . .
>
> A law which does me some injury is one thing. A law which makes me do wrong is another. The first I may submit to while seeking its repeal. To the latter I must not give place by subjection, no, not for an hour. I must resist unto blood, striving against sin, i.e. to the patient shedding of my own blood. Hence, to disobey such a law does not disorganize society. It does

not unsettle law." Beecher, *The Duty of Disobedience to Wicked Laws* 12 (1851).

Similarly Chief Justice Stone noted:

"Viewed in its practical aspects, however, there may be and probably is a very radical distinction between compelling a citizen to refrain from acts which he regards as moral but which the majority of his fellow citizens and the law regard as immoral or unwholesome to the life of the state on the one hand, and compelling him on the other to do affirmative acts which he regards as unconscientious and immoral. The action of the state in compelling the citizen to refrain from doing an act which he regards as moral and conscientious does not in most instances which are likely to occur do violence to his conscience; but conscience is violated if he is coerced into doing an act which is opposed to his deepest convictions of right and wrong. The traditional view of the common law that right motives are no defense for crime and should not stay the hand of the law gives very little clue, therefore, to the sound method of dealing with the conscientious objector to war, in the realm of either morals or policy. However rigorous the state may be in repressing the commission of acts which are regarded as injurious to the state, it may well stay its hand before it compels the commission of acts which violate the conscience." Stone, *op. cit.* 268-69.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that the judgment of the Court of Appeals be reversed and the cause remanded with directions to order dismissal of the indictment.

Respectfully submitted,

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